# THE Public Interest

NUMBER 111, SPRING 1993, PRICE: $5.50

**Teaching the Virtues**
*Christina Hoff Sommers*

**Babies for Sale** — *Robin Fox*

**Television and Violent Crime** — *Brandon S. Centerwall*

**A Conservative Case for Judicial Activism** — *David P. Bryden*

**A New Plan for the Family** — *Richard T. Gill & T. Grandon Gill*

**The End of Welfare as We Know It?** — *Douglas J. Besharov*

**Are Smokers Rational?** — *Nicholas Eberstadt*

**Thatcher's Vision** — *Irwin M. Stelzer*

**The Triumph of American Nationalism**
*Michael Barone*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE Public Interest

NUMBER 111, SPRING 1993

## CONTENTS

| | | |
|---|---|---|
| Teaching the Virtues | *Christina Hoff Sommers* | 3 |
| Babies for Sale | *Robin Fox* | 14 |
| The Triumph of American Nationalism | *Michael Barone* | 41 |
| *Our Cultural Perplexities (V)*: Television and Violent Crime | *Brandon S. Centerwall* | 56 |
| A Conservative Case for Judicial Activism | *David P. Bryden* | 72 |
| A New Plan for the Family | *Richard T. Gill & T. Grandon Gill* | 86 |
| The End of Welfare as We Know It? | *Douglas J. Besharov with Amy Fowler* | 95 |
| Are Smokers Rational? | *Nicholas Eberstadt* | 109 |
| Thatcher's Vision | *Irwin M. Stelzer* | 116 |
| Contributors | | 122 |

THE PUBLIC INTEREST (ISSN-0033-3557) is published quarterly by National Affairs, Inc., and appears in Winter, Spring, Summer, and Fall issues. Its office of publication is located at 1112 16th Street, NW, Suite 530, Washington, DC 20036. Telephone: (202) 785-8555. If you have a problem with your subscription, please call (800) 783-4903. Subscription price: $21 for one year, $38 for two years, $54 for three years. Add $3 annually for Canadian and foreign subscriptions. Back issues are available for $6.00. Unsolicited material cannot be returned unless accompanied by sufficient return postage. Second-class postage is paid at Washington, DC, and at additional mailing offices.
©1993 by National Affairs, Inc.
Postmaster: Please send all changes of address to *The Public Interest* Subscription Office, Dept. PI, P.O. Box 3000, Denville, NJ 07834. Articles appearing in this journal are abstracted and indexed in *Reader's Guide, P.A.I.S., Historical Abstracts, ABC Pol Sci, Social Science Index. Sociological Abstracts, Academic Abstracts, Social Science Source,* and *America: History and Life,* and are available on microfilm from University Microfilms International. *The Public Interest* is printed by William Byrd Press.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

**Editors**
Irving Kristol and Nathan Glazer

**Publication Committee**
Martin Feldstein
Harry Kahn
H. J. Kaplan
Charles Krauthammer
Glenn C. Loury
Harry McPherson
Daniel P. Moynihan
Charles Murray
Isabel V. Sawhill
Martin E. Segal
Arthur L. Singer, Jr.
Roger Starr
Irwin M. Stelzer
James Q. Wilson

**Executive Editor**
Ira Carnahan

**Assistant Managing Editors**
Joshua Abramowitz
Eric Reis

**Assistant to the Editors**
Karis Kercher

**Editorial Office**
1112 16th Street, NW, Suite 530
Washington, DC 20036

**Subscription Office**
*The Public Interest*, Department PI
P.O. Box 3000
Denville, NJ 07834

**Newsstand Distributors**
Bernhard DeBoer, Inc.
113 Centre Street
Nutley, NJ 07110

Ingram Periodicals, Inc.
1226 Heil Quaker Boulevard
La Vergne, TN 37086

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# Teaching the virtues

CHRISTINA HOFF SOMMERS

SOME TIME AGO, I published an article called "Ethics without Virtue," in which I criticized the way ethics is being taught in American colleges. I pointed out that there is an overemphasis on social policy questions, with little or no attention being paid to private morality. I noted that students taking college ethics are debating abortion, euthanasia, capital punishment, DNA research, and the ethics of transplant surgery while they learn almost nothing about private decency, honesty, personal responsibility, or honor. Topics such as hypocrisy, self-deception, cruelty, or selfishness rarely come up. I argued that the current style of ethics teaching, which concentrates so much on social policy, is giving students the wrong ideas about ethics. Social morality is only half of the moral life; the other half is private morality. I urged that we attend to both.

A colleague of mine did not like what I said. She told me that in her classroom she would continue to focus on issues of social injustice. She taught about women's oppression, corruption in big business, multinational corporations and their transgressions



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in the Third World—that sort of thing. She said to me, "You are not going to have moral people until you have moral institutions. You will not have moral citizens until you have a moral government." She made it clear that I was wasting time and even doing harm by promoting bourgeois virtues instead of awakening the social conscience of my students.

At the end of the semester, she came into my office carrying a stack of exams and looking very upset.

"What's wrong?" I asked.

"They cheated on their social justice take-home finals. They plagiarized!" More than half of the students in her ethics class had copied long passages from the secondary literature. "What are you going to do?" I asked her. She gave me a self-mocking smile and said, "I'd like to borrow a copy of that article you wrote on ethics without virtue."

There have been major cheating scandals at many of our best universities. A recent survey reported in the *Boston Globe* says that 75 percent of all high school students admit to cheating; for college students the figure is 50 percent. A *U.S. News and World Report* survey asked college-age students if they would steal from an employer. Thirty-four percent said they would. Of people forty-five and over, 6 percent responded in the affirmative.

Part of the problem is that so many students come to college dogmatically committed to a moral relativism that offers them no grounds to think that cheating is just wrong. I sometimes play a macabre game with first-year students, trying to find some act they will condemn as morally wrong: Torturing a child. Starving someone to death. Humiliating an invalid in a nursing home. The reply is often: "Torture, starvation, and humiliation may be bad for you or me, but who are we to say they are bad for someone else?"

Not all students are dogmatic relativists, nor are they all cheaters and liars. Even so, it is impossible to deny that there is a great deal of moral drift. Students' ability to arrive at reasonable moral judgments is severely, even bizarrely, affected. A Harvard University professor annually offers a large history class on the Second World War and the rise of the Nazis. Some years back, he was stunned to learn from his teaching assistant that the majority of students did not believe that anyone was really to blame for the Holocaust. In the students' minds the Holocaust

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

was like a natural cataclysm: It was inevitable and unavoidable. The professor refers to his students' attitude about the past as "no-fault history."

One philosopher, Alasdair MacIntyre, has said that we may be raising a generation of "moral stutterers." Others call it moral illiteracy. Education consultant Michael Josephson says "there is a hole in the moral ozone." Well, what should the schools be doing to make children morally literate, to put fault back into no-fault history, to mend the hole in the moral ozone?

## The new ethics

First, a bit of history. Let me remind you of how ethics was once taught in American colleges. In the nineteenth century, the ethics course was a high point of college life. It was taken in the senior year, and was usually taught by the president of the college, who would uninhibitedly urge the students to become morally better and stronger. The senior ethics course was in fact the culmination of the students' college experience. But as the social sciences began to flourish in the early twentieth century, ethics courses gradually lost prominence until they became just one of several electives offered by philosophy departments. By the mid-1960s, enrollment in courses on moral philosophy reached an all-time low and, as one historian of higher education put it, "college ethics was in deep trouble."

At the end of the '60s, there was a rapid turnaround. To the surprise of many a department chair, applied ethics courses suddenly proved to be very popular. Philosophy departments began to attract unprecedented numbers of students to courses in medical ethics, business ethics, ethics for everyday life, ethics for lawyers, for social workers, for nurses, for journalists. More recently, the dubious behavior of some politicians and financiers has added to public concern over ethical standards, which in turn has contributed to the feeling that college ethics is needed. Today American colleges and universities are offering thousands of well-attended courses in applied ethics.

I too have been teaching applied ethics courses for several years. Yet my enthusiasm tapered off when I saw how the students reacted. I was especially disturbed by comments students made again and again on the course evaluation forms: "I learned there was no such thing as right or wrong, just good or bad

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

arguments." Or: "I learned there is no such thing as morality." I asked myself what it was about these classes that was fostering this sort of moral agnosticism and skepticism. Perhaps the students themselves were part of the problem. Perhaps it was their high school experience that led them to become moral agnostics. Even so, I felt that my classes were doing nothing to change them.

The course I had been giving was altogether typical. At the beginning of the semester we studied a bit of moral theory, going over the strengths and weaknesses of Kantianism, utilitarianism, social contract theory, and relativism. We then took up topical moral issues such as abortion, censorship, capital punishment, world hunger, and affirmative action. Naturally, I felt it my job to present careful and well-argued positions on all sides of these popular issues. But this atmosphere of argument and counterargument was reinforcing the idea that *all* moral questions have at least two sides, i.e., that all of ethics is controversial.

Perhaps this reaction is to be expected in any ethics course primarily devoted to issues on which it is natural to have a wide range of disagreement. In a course specifically devoted to dilemmas and hard cases, it is almost impossible *not* to give the student the impression that ethics itself has no solid foundation.

## Uncontroversial truths

The relevant distinction here is between "basic" ethics and "dilemma" ethics. It is basic ethics that G. J. Warnock has in mind when he warns his fellow moral philosophers not to be bullied out of holding fast to the "plain moral facts." Because the typical course in applied ethics concentrates on problems and dilemmas, the students may easily lose sight of the fact that some things are clearly right and some are clearly wrong, that some ethical truths are not subject to serious debate.

I recently said something to this effect during a television interview in Boston, and the skeptical interviewer immediately asked me to name some uncontroversial ethical truths. After stammering for a moment I found myself rattling off several that I hold to be uncontroversial:

> It is wrong to mistreat a child, to humiliate someone, to torment an animal. To think only of yourself, to steal, to lie, to break promises.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> And on the positive side: It is right to be considerate and respectful of others, to be charitable and generous.

Reflecting again on that extemporaneous response, I am aware that not everyone will agree that all of these are plain moral facts. But teachers of ethics are free to give their own list or to pare down mine. In teaching ethics, one thing should be made central and prominent: Right and wrong do exist. This should be laid down as uncontroversial lest one leaves an altogether false impression that *everything* is up for grabs.

It will, I think, be granted that the average student today does not come to college steeped in a religious or ethical tradition in which he or she has uncritical confidence. In the atmosphere of a course dealing with hard and controversial cases, the contemporary student may easily find the very idea of a stable moral tradition to be an archaic illusion. I am suggesting that we may have some responsibility here for providing the student with what the philosopher Henry Sidgwick called "moral common sense." More generally, I am suggesting that we should assess some of the courses we teach for their *edificatory* effect. Our responsibility as teachers goes beyond purveying information about the leading ethical theories and developing dialectical skills. I have come to see that dilemma ethics is especially lacking in edificatory force, and indeed that it may even be a significant factor in encouraging a superficial moral relativism or agnosticism.

I shall not really argue the case for seeing the responsibility of the teacher of ethics in traditional terms. It would seem to me that the burden of argument is on those who would maintain that modern teachers of ethics should abjure the teacher's traditional concern with edification. Moreover, it seems to me that the hands-off posture is not really as neutral as it professes to be. (Author Samuel Blumenfeld is even firmer on this point. He says, "You have to be dead to be value-neutral.") One could also make a case that the new attitude of disowning responsibility probably contributes to the student's belief in the false and debilitating doctrine that there are no "plain moral facts" after all. In tacitly or explicitly promoting that doctrine, the teacher contributes to the student's lack of confidence in a moral life that could be grounded in something more than personal dispo-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sition or political fashion. I am convinced that we could be doing a far better job of moral education.

## How to teach ethics

If one accepts the idea that moral edification is not an improper desideratum in the teaching of ethics, then the question arises: What sort of course in ethics is effective? What ethical teachings are naturally edificatory? My own experience leads me to recommend a course on the philosophy of virtue. Here, Aristotle is the best place to begin. Philosophers as diverse as Plato, Augustine, Kant, and even Mill wrote about vice and virtue. And there is an impressive contemporary literature on the subject. But the *locus classicus* is Aristotle.

Students find a great deal of plausibility in Aristotle's theory of moral education, as well as personal relevance in what he says about courage, generosity, temperance, and other virtues. I have found that an exposure to Aristotle makes an immediate inroad on dogmatic relativism; indeed the tendency to discuss morality as relative to taste or social fashion rapidly diminishes and may vanish altogether. Most students find the idea of developing virtuous character traits naturally appealing.

Once the student becomes engaged with the problem of what kind of person to be, and how to *become* that kind of person, the problems of ethics become concrete and practical and, for many a student, moral development is thereafter looked on as a natural and even inescapable undertaking. I have not come across students who have taken a course in the philosophy of virtue saying that they have learned there is no such thing as morality. The writings of Aristotle and of other philosophers of virtue are full of argument and controversy, but students who read them with care are not tempted to say they learned "there is no right or wrong, only good or bad arguments."

At the elementary and secondary level students may be too young to study the philosophy of virtue, but they certainly are capable of reading stories and biographies about great men and women. Unfortunately, today's primary school teachers, many of whom are heavily influenced by what they were taught in trendy schools of education, make little use of the time-honored techniques of telling a story to young children and driving home "the moral of the story." What are they doing?

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

## How *not* to teach ethics

One favored method of moral education that has been popular for the past twenty years is called "values clarification," which maintains the principle that the teacher should never directly tell students about right and wrong; instead the students must be left to discover "values" on their own. One favored values clarification technique is to ask children about their likes and dislikes: to help them become acquainted with their personal preferences. The teacher asks the students, "How do you feel about homemade birthday presents? Do you like wall-to-wall carpeting? What is your favorite color? Which flavor of ice cream do you prefer? How do you feel about hit-and-run drivers? What are your feelings on the abortion question?" The reaction to these questions—from wall-to-wall carpeting to hit-and-run drivers—is elicited from the student in the same tone of voice, as if one's personal preferences in both instances are all that matter.

One of my favorite anecdotes concerns a teacher in Massachusetts, who had attended numerous values-clarification workshops and was assiduously applying their techniques in her class. The day came when her class of sixth graders announced that they valued cheating and wanted to be free to do it on their tests. The teacher was very uncomfortable. Her solution? She told the children that since it was *her* class, and since she was opposed to cheating, they were not free to cheat. "I personally value honesty; although you may choose to be dishonest, I shall insist that we be honest on our tests here. In other areas of your life, you may have more freedom to be dishonest..."

Now this fine and sincere teacher was doing her best not to indoctrinate her students. But what she was telling them is that cheating is not wrong if you can get away with it. Good values are "what one values." She valued the norm of not cheating. That made this value binding on her, and gave her the moral authority to enforce it in her classroom; others, including the students, were free to choose other values "in other areas." The teacher thought she had no right to intrude by giving the students moral direction. Of course, the price for her failure to do her job of inculcating moral principles is going to be paid by her bewildered students. They are being denied a structured way to develop values. Their teacher is not about to give it to them lest

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

she interfere with their freedom to work out their own value systems.

This Massachusetts teacher values honesty, but her educational theory does not allow her the freedom to take a strong stand on honesty as a moral principle. Her training has led her to treat her "preference" for honesty as she treats her preference for vanilla over chocolate flavored ice cream. It is not hard to see how this doctrine is an egoistic variant of ethical relativism. For most ethical relativists, public opinion is the final court of ethical appeal; for the proponent of values clarification, the locus of moral authority is to be found in the individual's private tastes and preferences.

How sad that so many teachers feel intellectually and "morally" unable to justify their own belief that cheating is wrong. It is obvious that our schools must have clear behavior codes and high expectations for their students. Civility, honesty, and considerate behavior must be recognized, encouraged, and rewarded. That means that moral education must have as its *explicit* aim the moral betterment of the student. If that be indoctrination, so be it. How can we hope to equip students to face the challenge of moral responsibility in their lives if we studiously avoid telling them what is right and what is wrong?

The elementary schools of Amherst, New York, provide good examples of an unabashedly directive moral education. Posters are placed around the school extolling kindness and helpfulness. Good behavior in the cafeteria is rewarded with a seat at a "high table" with tablecloth and flowers. One kindergarten student was given a special award for having taken a new Korean student under her wing. But such simple and reasonable methods as those practiced in Amherst are rare. Many school systems have given up entirely the task of character education. Children are left to fend for themselves. To my mind, leaving children alone to discover their own values is a little like putting them in a chemistry lab and saying, "Discover your own compounds, kids." If they blow themselves up, at least they have engaged in an authentic search for the self.

Ah, you may say, we do not let children fend for themselves in chemistry laboratories because we have *knowledge* about chemistry. But is there really such a thing as *moral* knowledge? The reply to that is an emphatic "Yes." Have we not learned a thing

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

or two over the past several thousand years of civilization? To pretend we know nothing about basic decency, about human rights, about vice and virtue, is fatuous or disingenuous. Of course we know that gratuitous cruelty and political repression are wrong, that kindness and political freedom are right and good. Why should we be the first society in history that finds itself hamstrung in the vital task of passing along its moral tradition to the next generation?

Some opponents of directive moral education argue that it could be a form of brainwashing. That is a pernicious confusion. To brainwash is to diminish someone's capacity for reasoned judgment. It is perversely misleading to say that helping children to develop habits of truth telling or fair play threatens their ability to make reasoned choices. Quite the contrary: Good moral habits enhance one's capacity for rational judgments.

The paralyzing fear of indoctrinating children is even greater in high schools than it is in elementary schools. One favored teaching technique that allegedly avoids indoctrination of children—as it allegedly avoids indoctrination of college students—is dilemma ethics. Children are presented with abstract moral dilemmas: Seven people are in a lifeboat with provisions for four—what should they do? Or Lawrence Kohlberg's famous case of Heinz and the stolen drug. Should the indigent Heinz, whose dying wife needs medicine, steal it? When high school students study ethics at all, it is usually in the form of pondering such dilemmas or in the form of debates on social issues: abortion, euthanasia, capital punishment, and the like. Directive moral education is out of favor. Storytelling is out of fashion.

## Telling stories

Let's consider for a moment just how the current fashion in dilemmas differs from the older approach to moral education, which often used tales and parables to instill moral principles. Saul Bellow, for example, asserts that the survival of Jewish culture would be inconceivable without the stories that give point and meaning to the Jewish moral tradition. One such story, included in a collection of traditional Jewish tales that Bellow edited, is called "If Not Higher." I sketch it here to contrast the story approach with the dilemma approach in primary and sec-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ondary education, but the moral of the contrast applies to the teaching of ethics at the college level as well:

> There was once a rabbi in a small Jewish village in Russia who vanished every Friday for several hours. The devoted villagers boasted that during these hours their rabbi ascended to Heaven to talk with God. A skeptical newcomer arrived in town, determined to discover where the rabbi really was.
>
> One Friday morning the newcomer hid near the rabbi's house, watched him rise, say his prayers, and put on the clothes of a peasant. He saw him take an ax and go into the forest, chop down a tree, and gather a large bundle of wood. Next the rabbi proceeded to a shack in the poorest section of the village in which lived an old woman. He left her the wood, which was enough for the week. The rabbi then quietly returned to his own house.
>
> The story concludes that the newcomer stayed on in the village and became a disciple of the rabbi. And whenever he hears one of his fellow villagers say, "On Friday morning our rabbi ascends all the way to Heaven," the newcomer quietly adds, "If not higher."

In a moral dilemma such as Kohlberg's Heinz stealing the drug, or the lifeboat case, there are no obvious heroes or villains. Not only do the characters lack moral personality, but they exist in a vacuum outside of traditions and social arrangements that shape their conduct in the problematic situations confronting them. In a dilemma there is no obvious right and wrong, no clear vice and virtue. The dilemma may engage the students' minds; it only marginally engages their emotions, their moral sensibilities. The issues are finely balanced, listeners are on their own and they individually decide for themselves. As one critic of dilemma ethics has observed, one cannot imagine parents passing down to their children the tale of Heinz and the stolen drug. By contrast, in the story of the rabbi and the skeptical outsider, it is not up to the listener to decide whether or not the rabbi did the right thing. The moral message is clear: "Here is a good man—merciful, compassionate, and actively helping someone weak and vulnerable. Be like that person." The message is contagious. Even the skeptic gets the point.

Stories and parables are not always appropriate for high school or college ethics courses, but the literary classics certainly are. To understand *King Lear*, *Oliver Twist*, *Huckleberry Finn*, or *Middlemarch* requires that the reader have some understanding of (and sympathy with) what the author is saying about the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

moral ties that bind the characters and that hold in place the social fabric in which they play their roles. Take something like filial obligation. One moral of *King Lear* is that society cannot survive when filial contempt becomes the norm. Literary figures can thus provide students with the moral paradigms that Aristotle thought were essential to moral education.

## What to do

I am not suggesting that moral puzzles and dilemmas have no place in the ethics curriculum. To teach something about the logic of moral discourse and the practice of moral reasoning in resolving conflicts of principles is clearly important. But casuistry is not the place to *start*, and, taken by itself, dilemma ethics provides little or no moral sustenance. Moreover, an exclusive diet of dilemma ethics tends to give the student the impression that ethical thinking is a lawyer's game.

If I were an educational entrepreneur I might offer you a four- or five-stage program in the manner of some of the popular educational consultants. I would have brochures, audio-visual materials. There would be workshops. But there is no need for brochures, nor for special equipment, nor for workshops. What I am recommending is not new, has worked before, and is simple:

1. Schools should have behavior codes that emphasize civility, kindness, self-discipline, and honesty.
2. Teachers should not be accused of brainwashing children when they insist on basic decency, honesty, and fairness.
3. Children should be told stories that reinforce goodness. In high school and college, students should be reading, studying, and discussing the moral classics.

I am suggesting that teachers must help children become acquainted with their moral heritage in literature, in religion, and in philosophy. I am suggesting that virtue can be taught, and that effective moral education appeals to the emotions as well as to the mind. The best moral teaching inspires students by making them keenly aware that their own character is at stake.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# Babies for sale

ROBIN FOX

CAN YOU WRITE a commercial contract for a baby? Can a man buy his own child? Who owns the frozen embryos of a dead woman; can they be willed to third parties? It has been five years since the controversial and emotional "Baby M" case was legally settled, but we have barely begun to understand its implications.

The public read the headlines and moved on. But given advances in the so-called "New Birth Technologies" we are faced with a bewildering future for the very definition of the family, if not of the individual. In a world awash with rhetoric about family values, there are lessons to be learned from a close examination of the case and the public reaction to it.

We are a civilization obsessed with the model of the individual contractor as the ultimate social unit. In some ways, as Sir Henry Maine forcefully reminded us, the shift from social relations based on Status—what sociologists would now call "ascribed status"—to those based on Contract is the major shift in



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Western society over the historic period. The model for relations of Status was of course kinship—the family. A king was the father of his nation; God was the father of his people; the Church was the mother of us all. In the world of Contract, however, all parties are equal and autonomous contractors bound by their agreements. Society itself is such a contractual arrangement. The islands of Status, like slavery, have gradually been swept away, especially in the United States. Here, as Lawrence Friedman so graphically describes it, King Contract triumphed in the nineteenth and twentieth centuries as the model for *all* agreements between those acting rationally in their own interests.

One area held out for Status: the family. Or did it? This is the issue the Baby M case raised. And while there was indeed a settlement of sorts, it was an uneasy one, and one that was not convincing to a large segment of the American public. For Mary Beth Whitehead had not just demanded to keep "her" baby; she had challenged the power of almighty Contract. She issued this challenge in the name of motherhood. But as we shall see, motherhood, for all its hype, is a slender reed in the contractual wind.

## A contract forbidding bonds

In March 1986 a baby girl was born to Mary Beth Whitehead, a housewife in Brick Township, New Jersey. It was her third child—she already had a girl (Tuesday) and a boy (Ryan); she called it Sara Elizabeth. Mr. Whitehead, however—at that point employed as a garbage collector—was not Sara's father. The baby had been conceived and born as a result of a contractual agreement between the Whiteheads and William and Elizabeth Stern, a biochemist and physician respectively, of Tenafly, New Jersey, whereby Mrs. Whitehead was artificially inseminated with Mr. Stern's sperm. The contract was drawn up on February 6, 1985 by a lawyer, Noel Keane, of The Infertility Center of New York, a private organization concerned with bringing together infertile couples and potential surrogate mothers. The Center's fee for this service was $7,500.

The motives of the parties seemed fairly clear at the time. Mrs. Stern was unable to bear children for medical reasons. Mr. Stern had lost all his family in the Nazi genocide and desperately wanted to have a child of his own blood as a kind of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

psycho-physical replacement for the lost kin. Mrs. Whitehead saw an advertisement for the clinic, and considering her family's marginal economic condition and the relative ease and pleasure with which she had already twice given birth, felt capable of performing as a surrogate mother. She was to receive $10,000 for her services and all expenses would be paid by the Sterns. The parties met, Bill and Betsy liked Mary Beth, and she felt well-disposed to them. Richard Whitehead at first was dubious but eventually agreed. The contract—or "Surrogate Parenting Agreement"—was accepted and signed.

Let us pause here to consider this all-important contract. Right up front it states, in Clause 2, that "the sole purpose of this Agreement is to enable William Stern and his infertile wife to have a child which is biologically related to William Stern." In the next clause it puts the whole issue on the line:

> MARY BETH WHITEHEAD, Surrogate, represents that she is capable of conceiving children. MARY BETH WHITEHEAD understands and agrees that in the best interests of the child, she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to, pursuant to the provisions of this Agreement, and shall freely surrender custody to WILLIAM STERN, Natural Father, immediately upon birth of the child; and terminate all parental rights to said child pursuant to this agreement.

So before any of the details—even before any mention of the artificial insemination—the contract insists that the natural mother of the child who must "conceive, carry to term and give birth to" it, should not "form a parent-child relationship" with it. Clearly this must refer to the post-birth situation since, we must immediately ask, how can the mother *not* form a relationship with the child to whom she has been so intimately attached for nine months? And if, as there is much evidence to show, the most fundamental point of this parent-fetus bonding process occurs at birth itself, then short of bypassing the actual birth process how can the mother voluntarily refuse to form such a bond?

The contract, however, not only assumes she can but makes this the most fundamental of its conditions. It is as if the designer (Keane) knew in advance that the most difficult part of such an agreement was not the numerous medical details, but the prohibition of a natural process: that it was this that was

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

most likely to derail the proceedings and therefore had to be gotten out of the way first.

The next provision obtains Richard Whitehead's agreement to the same conditions and to the artificial insemination, and "rebut[s] the presumption of paternity of any offspring conceived and born pursuant to aforementioned agreement." This is because the law, in the absence of proof to the contrary, does assume any children born to a wife to be the natural children of her husband. (This goes back to Roman law. *Pater est quem nuptiae demonstrant*: the legal father of a child is he who can show marriage to the mother.) The third provision of this clause enjoins Mrs. Whitehead to cooperate in medical examinations, carry the baby to term, and surrender all parental rights.

The next clause concerns the payment of the fees and expenses, and includes agreement to paternity testing. If Stern is found not to be the father, then the deal is off, and the Whiteheads must reimburse the Sterns for all expenses incurred.

Clause 5 asks the Whiteheads to "understand and assume all risks, including the risk of death, which are incidental to conception, pregnancy and childbirth, including, but not limited to, postpartum complications." Clause 6 demands "psychiatric evaluations" of the Whiteheads, and permits a release of these to ICNY or the Sterns. The evaluation was indeed made and the psychiatrist, Joan Einwohner, concluded thus:

> It is the examiner's impression that Ms. Whitehead is sincere in her plan to become a surrogate mother and that she has thought extensively about the plan. However, I do have some concern about her tendency to deny feelings and think it would be important to explore with her in somewhat more depth whether she will be able to relinquish the child in the end.

There was more to this effect. The explorations in more depth never took place, and this evaluation was never communicated to the Sterns by ICNY.

The issue of miscarriage was then addressed. If the miscarriage occurred before the fifth month—no compensation for the mother; if after the fifth month, she would receive $1,000 for her services. Physical examinations and the possibility of no pregnancy were then dealt with. Then, in Clause 13, came the matter of abortion:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> MARY BETH WHITEHEAD, Surrogate, agrees that she will not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for the physical health of MARY BETH WHITEHEAD or the child has been determined by said physician to be physiologically abnormal. MARY BETH WHITEHEAD further agrees, upon the request of said physician to undergo amniocentesis or similar tests to detect genetic and congenital defects. In the event that said test reveals that the fetus is genetically or congenitally abnormal, MARY BETH WHITEHEAD, Surrogate, agrees to abort the fetus upon demand of WILLIAM STERN, Natural Father, in which case the fee paid to the Surrogate will be in accordance with paragraph 10. If MARY BETH WHITEHEAD refuses to abort the fetus upon demand of WILLIAM STERN, his obligations as stated in this agreement shall cease forthwith, except as to obligations of paternity imposed by statute.

Thus the contract was not for a child as such but for *a genetically and physiologically perfect child.* Anything less could lead to a demand for abortion, and if this was refused, then the "surrogate" was stuck with the defective infant, no fee, and no expenses. The "natural father" would be in the clear. The next clause does admit that some such defects cannot be detected in advance, and if these occur then Stern "assumes the legal responsibility" for any such child. This is remarkably vague compared with the harsh specificity of the conditions imposed on the mother. Does "legal responsibility" extend to permanent custody or refer only to acknowledgement of paternity and child support?

In Clause 15, the "surrogate" agrees not to "smoke cigarettes, drink alcoholic beverages, use illegal drugs or take non-prescription medications," etc. And in the final clause Richard Whitehead agrees to execute a "refusal of consent" form. In this, Richard expressly refuses his consent to the artificial insemination while agreeing to all the other clauses. This is necessary so that Richard cannot be "declared or considered to be the legal father of the child conceived thereby."

I have spelled out the conditions of the contract for several reasons. Without knowing precisely what was in the contract it would be hard to have any sensible discussion (although much passionate debate was undertaken by parties who had never read the contract and had no idea what the specific provisions were). Also, as we have seen, the contract was loaded in favor of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

"natural father" from the start, as one might expect since he was paying the fees. With a stroke of the pen, and the payment of a hefty sum of money, he appeared to gain enormous control over "the surrogate": He could require insemination, amniocentesis, the regulation of maternal habits, prevention of the formation of parent-child bonds, risk of death, and even abortion (if the child were imperfect). Very few of those who insisted that "a contract was a contract" and that Mrs. Whitehead was bound to submit to its clauses, knew the clauses even existed in this form.

This was a contract, for a monetary consideration, concerning the conception, gestation, birth, and custody of a human being, in which a natural mother was asked to agree not to develop any maternal feelings, and to turn over her child unconditionally to the sperm donor who had paid for this privilege. But there it was. She had "freely entered into" the contract. She was of sound mind. She was not coerced by anything but financial need.

### Bonds negate the contract

But when Sara was born on March 27, 1986, the arrangement fell apart. Mrs. Whitehead did not want to give up the baby. She was flooded with feelings of guilt over surrendering Sara as well as guilt over disappointing the Sterns. But it came to her with overpowering strength that she was selling her baby "like a slave." She couldn't do it. The bond was simply too strong. She was allowed to take the baby home, but the Sterns insisted on their rights and eventually, with grief and desperation, Mrs. Whitehead gave up the child. The Sterns immediately named it Melissa and started the adoption process. Mrs. Whitehead refused to go through with the adoption and would not accept the $10,000. She was in such a distraught state that on March 30 the Sterns agreed to let her have the child "for a few days." When she again refused to relinquish the baby, the Sterns, armed with a lawyer (Gary Skolof), adoption papers, and the agreement, successfully applied for a court order to claim Sara/Melissa.

Their claim was heard by Superior Court Judge Harvey Sorkow on May 5th. Mrs. Whitehead had been breast-feeding the baby for forty days at this point. She was not represented at the hearings and the judge never interviewed her. He depended solely on the testimony of the Sterns' lawyer. The judge apparently had no qualms about the legitimacy of the contract and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

issued an *ex parte* order giving the Sterns sole custody. The grounds were that Mary Beth Whitehead had shown "mental instability" in her refusal to honor the contract, and that she might flee with the baby.

A bizarre scenario followed, almost Kafkaesque in its details, many of which cannot be given here since it is not the drama that concerns us but the legal issues. In summary, on May 5th, immediately after obtaining the order, the Sterns alerted the local police in Brick Township and descended on the Whitehead home with their court order. They produced the order, which demanded the surrender of one "Melissa Elizabeth Stern." They were momentarily stalled when the Whiteheads claimed no such baby existed and showed a legal birth certificate for "Sara Elizabeth Whitehead." While the police puzzled over this discrepancy, the infant was passed through a back window to Mr. Whitehead, who indeed fled with her to Mary Beth's parents' home in Florida. Once the disappearing trick was discovered, Mrs. Whitehead was handcuffed and arrested by the police, who later released her since they could not find any actual basis for arrest. Once released she too fled to Florida to join her husband and the baby and she resumed breast-feeding.

They stayed successfully in hiding, making fifteen moves over the course of almost three months, during which time Mrs. Whitehead repeatedly called William Stern to try to persuade him to stop the hunt and let her keep the baby, promising joint custody if he agreed. He refused to agree, taped the conversations (including Mary Beth's threats of suicide) on the advice of his lawyer, and hired private detectives to find the Whiteheads. Judge Sorkow had frozen the Whiteheads' bank account, the bank was about to foreclose on their mortgage, and they were out of funds. A judge in Florida issued an order, based on Sorkow's *ex parte* order, for repossession of the child. Later, when faced with all the facts, he rescinded the order, but by then it was too late.

The Sterns waited until Mrs. Whitehead was in a hospital being treated for an infection, then sent in armed private detectives and local police to the Florida home. Mary Beth's mother was manhandled and thrown to the ground. The baby was pulled from her crib, taken back to the police station, and handed over to the Sterns, who took her back to New Jersey. She had been

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

breast-feeding for 123 days at this point, and the judge ordered her weaned by the police. The Whiteheads returned to New Jersey, but were not allowed to see her for more than five weeks, when the judge allowed twice-weekly visits of one hour in a supervised facility with guards present. Mrs. Whitehead was specifically prohibited from breastfeeding her baby; her children were not allowed to see their sister. The Whiteheads by this time had a lawyer—on a *pro bono* basis, since they had no money—and they sued for custody. Suits, countersuits, motions, and petitions followed, until at last the trial date, before the same judge whose order had set in motion this bizarre train of events, was set for January 5, 1987, in the New Jersey Superior Court, Family Division, in Hackensack.

## When is a deal not a deal?

The story so far is bizarre enough, but the layman may be excused for wondering why the courts could not quickly and easily settle the issue. Yet the baby was conceived and born under circumstances for which no exact legal precedent existed. Nor was there any state or federal legislation which entirely covered the case. It was not unequivocally a simple custody matter, nor was it just an issue of legal adoption, nor was it a blatant case of "baby selling." States have laws covering these cases, but the surrogate mother case was, to say the least, murky. No statute or precedent seemed to cover it clearly. Hence the intense general, legal, and media interest in the "Baby M" trial as it had now become.

Whose baby was she? Did she belong to the mother who bore her, and hence the mother's legal husband, or did she belong to the genetic father who had a contract for her? Seventy percent of the public, according to polls by the *Bergen Record* and *Newsweek*, believed that "she signed a contract, she should hand over the baby." The minority (less than 20 percent) felt "a baby can't be taken from its natural mother, contract or no contract." The law had no immediate answer.

The response of the overwhelming public majority is interesting. The sanctity of contracts was elevated over the sanctity of motherhood. And indeed the law does by and large encourage contracts and holds the keeping of them to be a good thing. But the public was misled in thinking that if a contract or agreement

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is signed, then that is that: The conditions must be met. In fact, while any contract may be drawn up, the courts may or may not decide to honor it in the event of a breach of the contract by one party. They may very well decide that the contract was not legal in the first place, since there are some things about which we may not write contracts. But even if they decide it was legal, the issue then becomes: What kind of restitution will they order to the injured party? In the case in question, Mary Beth Whitehead (and her husband) might well have been in breach of the contract, but the question remained: Would the courts order "specific performance" of the contract—that is, the handing over of the child to the injured parties (the Sterns)—or would they decide that a monetary penalty (damages) and costs to the injured party would suffice?

Contrary to public opinion, courts have traditionally been reluctant to order specific performance. And this reluctance has been particularly strong in what are called "personal service" contracts—typically contracts of employment. They have been reluctant because to enforce such a contract is tantamount to enforcing servitude. If someone breaks a contract of employment, by leaving a job before the specified time for example, then a court will certainly award damages to the employer, but it will rarely insist that the term of service be completed, since this would interfere with what is seen as a basic constitutional right to freedom of movement. Employees are not serfs. Similarly with the contract of marriage: If one partner breaches this contract, then damages may be awarded to the other, but the court will never insist that the partner in breach of the contract be forced to continue in the marriage. People who hold the "a deal is a deal" principle rarely seem to invoke this when it comes to their own divorces.

New Jersey, following this general rule, is reluctant to enforce specific performance of personal service contracts. In fact the standard as applied in New Jersey is particularly exacting compared to other states. New Jersey further insists that specific performance should not be granted when it is either contrary to the public interest or would require the court to act inequitably. The New Jersey Supreme Court had ruled that specific performance should be denied if it violates basic principles of human dignity or would be "harsh and oppressive" to one of the parties. Thus with contracts to bear children and renounce parental rights,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

courts should be unwilling to enforce compliance when one or both parties are resistant.

But for the moment we are simply trying to establish that there is no simple "a deal is a deal" doctrine as far as the law is concerned, and that in this the law is a lot wiser than the public. But then, that is one reason we have the law in the first place: to protect us against our own worst instincts (or perhaps, more exactly, our own worst social and historical constructs).

As far as specific performance is concerned, the law seems clear: If there exists a market where one can obtain an adequate substitute, then the contract should not be enforced. And "subjective harm" is not the issue. That you desperately wanted the specific item in question (sentimental value, perhaps) is not at issue. You can get an adequate substitute. This establishes that performance of a contract is by no means automatic, and one might well argue that a sperm-donor father has a "market" out there in which he can obtain an adequate substitute. The substitute will still be his child. As A. Corbin, an expert on contract law, has stated, the onus is on the party seeking specific performance to prove that "a substantial equivalent for all practical purposes" is not readily obtainable from others in exchange for a monetary payment.

It is again remarkable how many people, presented with this argument, respond that it is "repugnant" to discuss a child in this manner—as the subject of a monetary agreement. These are often the same people who saw nothing wrong with the contract in the first place and insisted passionately that it should be upheld!

Equally, we have to consider the issue of "informed consent." A valid contract is unenforceable if one of the parties was, for example, under duress, or if relevant information was withheld from any of the parties, or for any reason that renders one of the parties not in a position to give "informed consent" to the document. Thus if you have a gun to my head when I sign, or if I am legally insane, then even though my signature is on the contract the court will declare it void. In this case, even if we regard the contract as valid in establishing parental rights for Mr. Stern, can we hold it as valid in *extinguishing* the parental rights of Mary Beth Whitehead? Can a woman in fact ever give "informed consent" to a promise to relinquish the child of her body? When it comes to giving up a child for adoption, for

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

example, every state except Wyoming holds that *consent to adoption prior to birth is invalid unless ratified after birth.*

The question, then, is open: Should a surrogate mother have fewer rights in this matter than the mother of a baby put up for adoption? There is here, it might be argued, a genetic father with rights in the child. This is not disputed. In the adoption case there is a genetic father also, but he is rarely ever consulted. The issue is, as we have said, whether an agreement is sufficient to extinguish the mother's parental rights.

Nor must we lose sight of the overriding consideration of the "best interests of the child"—fondly known in legal circles as "BIC." BIC arises only if the issue of custody is reached, that is, if the courts decide that parental rights reside in both father and mother. This would require a fitness hearing in which the court would try to determine which of the parents was most fit to have custody, and would probably allow visitation rights by the other parent, much as in a divorce case.

More to the point, perhaps, in countering the "a deal is a deal" mentality is the issue of what contracts can legally be written. All states and the federal government have statutes which specifically rule out certain things as subjects of contracts. Thus prostitution, slavery, and baby selling are prohibited in all states. Any contract, for example, to provide sexual services or to sell a baby could indeed be written and signed, but if a party defaulted and was sued, the suit would get nowhere and the plaintiffs might even be open to criminal prosecution.

### Can a father buy his baby?

In the various surrogate mother cases around the country that had cropped up, the specific issue of a mother refusing to give up her child had not arisen, so the Baby M case was to set an important precedent. But in anticipation of such cases, and in response to other issues in surrogate mothering being brought to court, many states had given relevant judgments and advanced legal opinions through their attorneys general. One of the most popular opinions was that surrogate mothering violates state "baby selling" statutes. Is this a fair analogy? Is surrogate mothering a form of baby selling?

Legal opinion largely said "yes." At the time, Kentucky provided the best testing ground since the courts at different levels

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

had taken different views and so aired most of the possibilities. The attorney general of Kentucky believed that surrogate mothering constitutes illegal baby selling. A Kentucky court, however, held that surrogate arrangements are very different from adoption arrangements. Kentucky did indeed have strong laws against selling children, but the court asked how a natural father could be characterized as either adopting or buying his own baby. He pays not for the child per se, but for the *services* of the surrogate in carrying and bearing the child. Since he cannot be buying his own child, the arrangement does not violate baby selling laws. The Kentucky Court of Appeals finally agreed with the attorney general: This *is* an adoption procedure (by the father's wife at least); money changes hands; it does contravene Kentucky laws.

## Looking to the Constitution

Thus any such contract must first get over the hurdle of whether or not it is "void as contrary to public policy." Even if it makes it past that test, the issue of "specific performance" is still open. But there is yet another hurdle. Such a contract may still be void if it infringes one or other of the parties' constitutional rights. What relevant constitutional issues might the surrogate mother cases raise? This has been much discussed but boils down essentially to three issues: the constitutional prohibition of slavery (the Thirteenth Amendment and Anti-Peonage Act); the "right to privacy" derived from the Fifth Amendment and applied, for example, to a woman's right to abortion in the famous *Roe v. Wade* case; and the equally derivative "right to procreate" with its corollary the "right to marry." The "right to procreate" is ambiguous insofar as it does not specify whether it extends automatically to custody rights over the results of its exercise. This case was to test just how far a right to procreate went. Then there is the mother's "right to the companionship of her children." And we could go on.

The fact is that often these basic constitutional rights (or basic rights derived from the Constitution) seem to be obscure or in conflict. They only become definitive through court rulings in specific cases. And these rulings can appear to conflict in turn. Much ingenious ink is spilled by eager students in law journal "notes" in attempts to reconcile the varying interpreta-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tions of the Constitution. For our purposes it is enough to note that the contract and its enforcement have to face the constitutional hurdles mentioned. Some commentaries, for example, have insisted that since the child is being given up to its father, it is not being enslaved, and therefore the Thirteenth Amendment is not infringed. But this overlooks the issue of whether the contract effectively enslaves the mother. The whole issue is muddied by the fact that family relationships have always been treated by all courts as special cases: Thus children are, according to some ultra-liberal critics, effectively enslaved to their parents with the acquiescence of the courts, and marriage contracts are treated differently from ordinary commercial contracts.

As I have mentioned, one of the most interesting aspects of the surrogate parenting issue is precisely this blurring of what have traditionally been separate areas: family relationships and contractual commercial relationships. The writers of "surrogate parenting" contracts seem to want to have it both ways: They want the contracts upheld as commercial documents, and at the same time they want constitutional protections for the privileged "parental" (i.e., non-commercial) status of the "father."

The combination of unprecedented consequences of non-coital reproductive techniques and the clash of principles in contract versus motherhood, as well as the specifics of the human drama in New Jersey, was what I believe made the Baby M case so intensely interesting to the world. We were not just deciding the fate of one baby, but perhaps getting close to redefining the nature of the family, and even the individual, in a world of Lockean contractual relations gone haywire.

## The court convenes

I shall not dwell in detail on the trial, since it rapidly became a media circus with the world press corps and all the major television networks in noisy attendance. For three weeks it was the nation's favorite soap opera. The details then are known to the world. And in any case, it is not so much the trial per se as the judge's decision that concerns us here. But we must look briefly at his conduct of the case, because his view reflected closely the majority opinion in the media and the polls. This opinion was of course largely middle-class opinion, and the middle-class commentators, with some notable ex-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ceptions, were uncompromisingly on the side of their peers the Sterns, and almost contemptuous of the claims of the feckless, working-class Catholic Whiteheads (who were, of course, never described as such).

For a start, the judge managed to rule out a great deal of testimony that might have been relevant, and to include a great deal that was not. He refused to hear experts who lacked direct knowledge of the parties in the case. Thus the authors of influential books on parent-infant bonding were barred from speaking, while a number of low-level and in some cases grossly incompetent "experts" were allowed to testify because they had interviewed the Whiteheads and/or the Sterns. Evidence about the long-term harm to a mother of losing a child was not allowed, because the purported harm to *this* mother had yet to occur and was therefore "hypothetical."

Mary Beth Whitehead faced other obstacles. A guardian *ad litem*—Lorraine Abrahams—had been appointed to represent Baby M. This meant that a further set of "experts" could be called to testify, without breaking ranks, against Mrs. Whitehead. Their testimony was supposed to be independent—and the guardian swore to this in court—but in fact they met for a total of more than twenty-four hours with the guardian, before and during the trial, and were obviously working in tandem. Together with the experts called by the Sterns they hammered away at Mary Beth's character.

Somewhere in all this the contract issue got lost. The judge initially had ordered two trials: one on the contract, one on custody. The Appeals Court ordered only one trial, so the judge decided, with almost theological finesse, that it should be one trial but in two parts. The first part was heard in a matter of hours, with each counsel arguing the case for and against the legitimacy of the contract. The judge barred any expert testimony on the contractual issue, and insisted that he was not going to get "mired in inquiries dealing with ethics, morality and theology." This meant that the first part of the trial was going to be very brief indeed. As the judge and Skolof wanted, the trial moved quickly into the custody phase, which in turn became a battle over Mrs. Whitehead's character.

Skolof was a custody lawyer, and before the trial he had announced that his tactic was to turn this into a custody battle, which he "knew how to win." First, he delayed the trial as long

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

as possible with numerous requests for more time. The longer Baby M was with the Sterns, the less likely was any court to order her return "in the best interests of the child." This tactic worked perfectly, and it took an order of the Supreme Court of New Jersey to get the trial started on January 5th.

Skolof's next tactic was to present a picture of the Sterns as an upright, middle-class, well-educated professional couple who could give an excellent home to to the baby (including trips to Bloomingdale's), as against the working-class, impoverished, unreliable Whiteheads who could not. In particular, the calm, serious, and capable Mrs. Stern (pediatrician), was to be contrasted with the whimsical, manipulative, dishonest, overprotective, and undereducated Mrs. Whitehead (ex-GoGo dancer). Harold Cassidy, the Whitehead's *pro bono* lawyer, refused to meet Skolof on his own terms. He would not indulge in "expert" mud-slinging against the Sterns; instead, he tried to build up a good picture of Mrs. Whitehead as a wife, mother, and neighbor, with his experts doing their best to counter the accusations of the Sterns' (and the guardian's) highly paid witnesses. The result of this mismatch was a foregone conclusion, and it is to that result we must now turn.

## Parens patriae super

Judge Harvey Sorkow rendered his judgment on March 31, 1987, after a three month trial of unprecedented media attention and world-wide publicity. He set the tone from the start:

> The primary issue to be determined by this litigation is what are the best interests of a child until now called "Baby M." All other concerns raised by counsel constitute commentary.

This attitude was to determine the whole judgment. Most of the legal issues discussed at length earlier were dismissed by Judge Sorkow as "non-issues." As Skolof had wanted, the trial became a custody battle and the judgment a custody judgment. There can be no equitable justice for the adult parties in the case, said the judge, and in any case it wasn't his place to find it. "The court will seek to achieve justice for the child." It will do this on the basis of the doctrine of *parens patriae*, roughly, "the country as parent."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

One must remember that Sorkow was essentially a family court judge, not a contract lawyer or a constitutional expert. He saw his business therefore as the subordination of any other consideration to the "best interests of the child," this being the traditional matter of family court disputes. His dismissal of contract and constitutional issues as "mere commentary" reflected this stance.

> [A]ll should listen again to the plea of the infant as voiced so poignantly by several of the professional witnesses, statements with which this court agrees to such an extent that it will use its total authority if required to accomplish these ends.

Thus dominated by the notion of *parens patriae*, and clearly of the opinion that the Whiteheads were unsuitable parents while the Sterns were exemplary, he proceeded to validate the contract, terminate Mrs. Whitehead's parental rights, order the adoption by Mrs. Stern of Baby M, and grant sole custody to the Sterns with no rights of visitation for the Whiteheads. Everything was premised on the "best interests of the child." For example, on the issue of "specific performance" the judge ruled:

> This court holds that whether there will be specific performance ... depends on whether doing so is in the child's best interest.... We find by clear and convincing evidence, indeed by a measure of evidence reaching beyond reasonable doubt, that Melissa's best interest will be served by being placed in her father's sole custody.

So much for specific performance. On the contract itself, the judge leaned heavily on the fact that there was no New Jersey statute covering surrogacy as such. Laws against baby selling did not apply, he said, because the baby was not sold to her natural father, who only paid for the surrogate's services. The surrogate was indeed a rented uterus. Adoption statutes did not apply, he said, because Mr. Stern did not need to adopt his own child, and, he noted, adoption by Mrs. Stern was not mentioned in the contract. Failing any statutes to govern the case, he argued, the contract should be treated as an ordinary commercial contract, regardless of the peculiar nature of its conditions. Thus, when it came to the issue of Mrs. Whitehead's parental rights, the judge refused to accept that statutory tests, as in adoption cases, applied. There is a presumption, in law, that the biological mother is the fit parent unless a hearing

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

specifically finds her to be unfit, that is, engaged in active, harmful behavior with regard to the child. Mrs. Whitehead was not entitled to such a presumption, said the judge, because in the contract she agreed not to be a "mother." So presumptions about motherhood could not apply to her. She had signed away her rights to maternity.

Constitutional matters got equally short shrift, although the judge was more cautious here. While the best interests of the child should dominate all other concerns *once the child was conceived*, he argued, it was indeed an invasion of privacy and unconstitutional to enforce any of the clauses up to the time of conception. And even after conception, it was clearly unconstitutional to enforce the abortion clause. But all the other clauses, including the all-important termination of parental rights clause, must be "specifically performed."

> The sole legal concepts that control are *parens patriae* and the best interests of the child. To wait for birth, to plan, pray and dream of the joy it will bring and then be told that the child will not come home, that a new set of rules applies and to ask a court to approve such a result deeply offends the conscience of this court.

Nothing is said about the destructive effects on the mother who may wish to keep the child of her body. In fact this is dismissed as another non-issue. She can just go back to where she was, he says. She didn't really want any other children of her own anyway, and her husband had had a vasectomy to this end. Therefore, it was in no way harsh or inequitable to enforce specific performance here. The "right to procreate" issue again is interpreted entirely in favor of the father. In fact, the judge held, any state interference with this right of the father to specific performance would itself be unconstitutional.

The essential provisions of Sorkow's decision were as follows:

> (1) The surrogate parenting agreement of February 6, 1985, will be specifically enforced.
>
> (2) The prior order of the court giving temporary custody to Mr. Stern is herewith made permanent. Prior orders of visitation are vacated.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

(3) The parental rights of the defendant Mary Beth Whitehead are terminated.

(4) Mr. Stern is formally adjudged the father of Melissa Stern.

(5) The New Jersey Department of Health [is] directed to amend all records of birth to reflect the paternity and name of the child to be Melissa Stern.

(6) The defendants (Whiteheads) ... must refrain from interfering with the parental and custodial rights of the plaintiff.

### Enlightenment in Trenton

Most people, in my experience, stopped following the trial at this point. If they knew anything of the appeal to the New Jersey Supreme Court it was what the media chose to stress: that the Supreme Court confirmed the grant of custody of Baby M to the Sterns. But the court's verdict deserves closer consideration, because on every other point it was a stunning reversal of the lower court's decision. On February 3, 1988, in a unanimous opinion written by Chief Justice C. J. Wilenz, the court:

(1) Found the contract to be invalid and contrary to New Jersey law and public policy;

(2) Found the *ex parte* order giving temporary custody to the Sterns to have been invalid;

(3) Voided the adoption of Baby M by Mrs. Stern;

(4) Restored Mrs. Whitehead's parental rights;

(5) Affirmed the order giving custody of Baby M to Mr. Stern; and

(6) Remanded to the lower court—but with a different judge—the question of the nature and extent of Mrs. Whitehead's future visitation rights.

Note my original argument was that even if the contract were found valid, it should not be enforced. Yet since the court, however, invalidated the contract largely on the basis of its in-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

compatibility with New Jersey law, the question of its enforceability did not arise.

The court was firm in its rejection of surrogacy contracts:

> We invalidate the surrogacy contract because it conflicts with the law and public policy of this State ... we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women.... [W]e void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child.

The illegality of the contract stems from its use of money to procure an adoption through private placement.

> Its use of money for this purpose—and we have no doubt whatsoever that the money is being paid to obtain an adoption and not, as the Sterns argue, for the personal services of Mary Beth Whitehead—is illegal and perhaps criminal.

In addition, the court decided, the contract was in fact "coercive." Prior even to conception, the mother agreed irrevocably to surrender the child to the adoptive couple. She also illegally agreed to surrender her parental rights. The court turned the "best interests of the child" argument—used by the lower court entirely to boost the Stern's case—completely around. The contract itself, the court said, totally ignored the "best interests of the child."

> In this case a termination of parental rights was obtained not by proving the statutory prerequisites but by claiming the benefit of contractual provisions.... The contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interests shall determine custody....

In other words, the contract preempted the right to decide custody "in the best interest of the child" that can only lie in the power of the courts. It was not the child's interests that the contract sought to protect, but the father's. The rights of the child were never considered. Indeed: "The surrogacy contract guarantees permanent separation of the child from one of its natural parents," thus running contrary to public policy in the state. "The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child, the father's

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

right no greater than the mother's.... The whole purpose of the surrogacy contract was to give the father the exclusive right to the child by destroying the rights of the mother...."

But above all, the court reserved its severest condemnation for the issue mentioned above: the failure of the contract to give any regard for the best interests of the child, which, ironically, as we have seen, was the doctrine central to Judge Sorkow's decision. "There is not the slightest suggestion that any enquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effects on the child of not living with its natural mother."

They conclude severely: "This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father." So the father here is buying his own child, the court says; he is paying money to obtain exclusive rights to it. He can't do that under the law. The contract is invalid from beginning to end.

On the issue of "informed consent," they found that no potential surrogate could be said to be fully informed in advance of pregnancy and birth:

> Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that ... is less than voluntary.

The justices also recognized the potential harm to the mother otherwise ignored by Judge Sorkow:

> The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns she was bought...; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child....

As regards the father's "right to procreate" they insisted that it was "no more than that." It was fulfilled by the artificial insemination and did not extend to the right to custody. This latter right had to be independently established (as in this case they felt it had been).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

On the crucial point of the *ex parte* order, which had started the whole thing rolling, they argued as follows:

> When father and mother are separated and disagree, at birth, on custody, only in an extreme, truly rare, case should the child be taken from its mother *pendente lite*, i.e., only in the most unusual case should the child be taken from the mother before the dispute is finally determined by the court on its merits. The probable bond between mother and child, and the child's need, not just the mother's, to strengthen that bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father—all counsel against temporary custody in the father.

It should also be noted that the court went out of its way to repudiate at length the "too harsh" judgment of Mrs. Whitehead's character and even, surprisingly, faced up to the otherwise taboo issue of social class—something that the lower court, the public, and most of the commentators had tried to ignore, treating obvious class differences between the Sterns and Whiteheads as though they were personal merits and defects of the individuals involved.

> We have a further concern regarding the trial court's emphasis on the Sterns' interest in Melissa's education as compared to the Whiteheads'. That this difference is a legitimate factor to be considered we have no doubt. But it should not be overlooked that a best-interests test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life. "Best interests" does not contain within it any idealized lifestyle; the question boils down to a judgement, consisting of many factors, about the likely future happiness of a human being. Stability, love, family happiness, and, ultimately, support of independence—all rank much higher in predicting future happiness than the likelihood of a college education....

One might have been forgiven at this point for expecting a resounding decision in Mrs. Whitehead's favor on the custody question. But in the end the court ducked from this issue. While Mary Beth might provide love, she might also not provide stability or the possibility of autonomy. The Sterns' experts were against her; her own witnesses were divided; and above all, "most convincingly, the three experts chosen by the court-appointed guardian *ad litem* of Baby M, each clearly free of all bias and interest, unanimously and persuasively recommended custody in the Sterns." This is the only place where this otherwise extraordinarily well-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

argued judgment falls into absurdity. But it was clear that the members of the court, for all their good sense and sound argument, could not, like most of the rest of middle-class America, find it in their hearts to deprive little Melissa (as she now was) of her trips to Bloomingdale's. Having dumped the major expert—Judge Sorkow—without ceremony, they fell back on the other experts to save them from the consequences of their own logic and enable them to deliver Baby M up to the Sterns in her own "best interest."

At the same time, the court restored fully Mrs. Whitehead's parental rights and hence her rights to visitation. She is the "legal mother," they said, and added somewhat ironically that she should not be "punished one iota because of the [illegal and possibly criminal] surrogacy contract." This was of course only with respect to visitation; she had already been punished since the illegal and criminal contract was what caused the issuance of the original *ex parte* order, which is what led to Baby M being kept in the primary custody of the Sterns for a year and a half, which in turn became a major argument for leaving her there so as not to disturb her settled situation.

## Offspring without sex

Our brief on the details of Baby M really ends here. But we have to recognize that "surrogate parenting" is only one of several New Reproductive Technologies (NRTs), all of which raise some similar issues. So-called *in vitro* fertilization, where sperm and egg are brought together in a petri dish, and the resulting fertilized egg implanted in the womb of, say, an infertile woman, has raised hopes for "curing" infertility ever since the technique was developed in Oldham, England, in 1978. But the egg of an infertile woman, together with her husband's sperm, can also be implanted by simple artifical insemination techniques into a surrogate mother.

This raises an interesting conundrum, since the surrogate in this case does not contribute any genetic material to the child she bears. Yet she is still the "genetrix" in our sense, and the *in utero* bonding and bonding at birth will still have taken place. How would her claim stand up in court? There could be no issue of breach of the adoption laws here since the wife of the sperm donor—the equivalent of Elizabeth Stern—would be also

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the genetic mother of the child. How should the claim of the totally genetic parents here stack up against resistance by the genetically unrelated surrogate? Does the contribution of a bit of the male donor's limitless supply of sperm, and the flushing out of a few ova from the female donor's fallopian tubes match up to nine months gestation and the risks of childbearing and childbirth? Is the surrogate in this case going to feel the child is any the less "hers" because she did not contribute the egg?

Even more bizarre scenarios can be considered. Take the case of an infertile husband with a wife who is fertile but cannot, for some reason, give birth. Her flushed-out ovum could be combined with sperm from a donor and implanted in a surrogate. Here we would have four people involved: a genetic mother married to a prospectively social father plus a genetic father (probably unknown) and an actual genetrix or birth mother. One can run around the possibilities, with the most bizarre being sperm and eggs from unknown donors being externally fused and then implanted in a surrogate who surrenders the eventual child for adoption to two other (possibly infertile) social parents: five people, none of whom had sex with any of the others. In the case of frozen sperm, a child could be that of a dead man; and with frozen embryos a child could be born to long dead parents. With frozen sperm and ova from dead parents being combined, children could technically be orphans at the moment of conception. It will only take a breakthrough in incubator technology to bypass the surrogate mother altogether, and produce offspring not only without sex but without mothers either; then we are truly in Huxley land. For the moment, however, the "rented womb" is still needed and hence will run into all the problems discussed in this chapter should the genetrix lay claim to the child.

Several countries have now introduced legislation to control or outlaw such procedures, so injurious do they seem to accepted notions of love, marriage and the family, and to the "normality" of parent-child relationships. The British Parliament has endorsed embryo research but criminalized surrogacy. The issues evoke deep feelings everywhere, and there is no consensus. On the one side the scientists and doctors, and an increasing number of infertile couples, claim "progress," while the opposition claims everything from "inhumanity" to the gross "unnaturalness" of the whole business. (The Catholic Church is a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

leading voice in this opposition.) Feminists seem to be divided on this issue. Some see surrogacy as freeing women from the necessity of childbirth to pursue careers and self-fulfillment, others see surrogacy as the apotheosis of sisterhood and cooperation among women, and yet others see it as an attack on the woman in her role as mother and a handing over of even more patriarchal control to males—especially the medical profession, which particularly excites their indignation (and not without reason).

It is scarcely surprising that there should be such passionate debate. This great leap forward in technology leaves us unprepared for what appears to be a total redefinition of the family, of marriage and "lawful procreation," and even of the individual. How much of himself—and in this case certainly herself—does the individual own, for example? If I may sell an ovum to some third party, have I any rights and duties towards the end product? If I donate sperm (actually I would be more likely to sell it) do I have paternal (or even contractual) obligations to its eventual bawling and gurgling consequences? The majority of us simply find these possibilities too remote from our traditional (and often religiously backed) notions of family and parenthood and love for offspring.

But how can we attack or defend such practices as "unnatural" if we have no established standards of what is "natural" in the first place? And how can we have these standards if relativism informs all our enquiries and tells us that whatever definitions we come up with will be merely social or cultural constructs? I would agree, for example, with those who say that the nuclear family is not a sacrosanct "natural" entity but simply one kind of institutional possibility. I have been saying so for thirty years or more. But as a student of mammalian behavior I would have to disagree that "motherhood" is a similar construct, depending on context for its meaning. A hard look at the mammals (including ourselves) tells us that no matter what the genetic link may be, the genetrix does indeed bond with the child in the womb and at parturition, and hence has a "natural" claim to it. If this is true, it at least gives us somewhere to start.

Thus a woman who has gone through gestation and parturition will be "primed" to bond with her child. If the bond takes, then she is not likely to repudiate it simply because she knows the genes in the child are not her own. The child is already

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

eliciting "mothering" responses, as indeed a non-related adopted infant will do for the parents who take it into their care. Claims of genetic relatedness, then, should not take precedence over those involving powerful proximate—especially bonding—mechanisms.

Other cultures take in stride the idea that a child may not have a father or that children can be born to a dead man. These are not the important things. All these cultures still try to satisfy the basic individual needs for sex, shelter, provisioning, property, dominance, companionship, love, bonding, respect, kinship, children, etc. The various institutional forms by which they do this can vary widely—they are indeed "cultural constructs"—but they are forms which still must answer basic individual needs or risk severe cultural dislocation. This is where relativism fails. Cultural constructs must be rooted in biological reality or they will surely collapse. The NRTs will survive only insofar as they acknowledge these basic realities. We have looked at only one example—if we try to force bonded mothers to give up their children in the name of contract (a cultural construct) we will fail, or at least deserve to fail. But the same principle can be extended to any of the other NRTs. Do they help or hinder the pursuit of those proximate motivations that are programmed into us by evolution to ensure the production of future generations? Here comparative enthnography may help us in showing the limits of human tolerance for variation—which are in fact quite wide. We have to learn how to rewrite the old rules to meet the new circumstances, and to control the new circumstances in the face of timeless realities.

Efforts so far to deal with the issue of NRTs have been largely legislative and restrictive. Surrogacy, for example, simply gets outlawed. Legislators—and social scientists—are happiest as philosopher-kings. But as the Baby M case has shown, we often do not know in advance what the problems will be. Thus a case by case approach may well generate more workable solutions to actual problems than will grand schemes of legislation aiming to solve hypothetical problems all at once. If I may venture an opinion on the surrogacy issue: I do not think surrogacy should be banned, since it has been proven to work in many cases with quite satisfactory results. I do obviously think, however, that a surrogate mother (even if genetically unrelated to her child)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

should not be required to give up the baby if she does not wish to. That seems to me to be the moral of this case. We can deal with the case of the unfrozen embryo, the product of a long-dead billionaire (and his mistress) whose fortune has already been divided among the other heirs excluding the unstable great-niece in whom the revived embryo has been implanted by an unscrupulous lawyer, when it arises. Michael Crichton is probably already at work on the novel.

## An American dilemma

Thus we come round full circle to the issue that the Baby M case thrust into our unwilling consciousness: How far are we willing to take our insistence on the dominance of the model of contract in social relationships? In a secular society, which is nevertheless riddled with sentimental religiosity, are there still some areas that we consider sacred and off-limits to the rules of contract? The advocates of traditional family values seem to think so, and are horrified when children are allowed to sue parents for breaches of implied "family contracts." We are in a socially schizophrenic state. We cling on the one hand to the secular contract model as the only model compatible with our individualist assumptions about how society should work. On the other hand, we seem to want certain areas declared out-of-bounds to the basic rule of contract.

But we simply can't decide where the boundaries are. Even the boundaries of the contracting individual are now becoming fuzzy, and organic products of one's own body (or parts fused with those from other bodies) become commodities subject to contractual agreements. This dilemma cuts across the usual liberal and conservative distinctions. Conservatives are as likely to be confused about the relative weights of contract and status as liberals are. Those who vociferously defend "family values" are equally likely to be those who stoutly defend the sanctity of contracts and the autonomy of the individual. And as we have seen, the issue divides feminists at least three ways.

For the moment, given the New Jersey precedent, it is illegal to write a commercial contract for a baby. But for frozen fertilized ova? The kinds of decisions we are faced with are decisions not just about specific cases, but about the kind of society we want to be. The winning of a revolutionary war provoked us to

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

rethink this problem in the late eighteenth century. The issue of slavery prompted us to rethink it yet again in the late nineteenth century. Perhaps the stubbornness of a New Jersey mother, in her love for her newborn child, will be the catalyst for a new such rethinking in the late twentieth century. We now have the advantage of a profounder understanding of the evolutionary basis of human nature and the limitations of social constructs. But we are very unhappy with the idea of such limitations, particularly when they affect our most cherished ideas. The chances of our getting it right are not good.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# The triumph of American nationalism

MICHAEL BARONE

THE WORLD has now had 160 years of experience with party politics in mass democracies. During this century and a half, the achievements of governments formed by these parties have been substantial. They have provided peaceful governance for great masses of people. They have fostered economic growth of a magnitude never before seen. They have, after a half-century struggle, rolled back the tide of totalitarianism that seemed in the dark days of 1940 and 1941 to be "the wave of the future." These achievements have been the achievements of democracies, but also of political parties; for everywhere we have had democracy, we have had parties.

During these 160 years, there have been four major types of parties: religious, liberal, socialist, and nationalist. To that list one can perhaps add ethnic, but an ethnic party by its nature seeks to represent only a subgroup of a country. Of course, some parties have partaken of more than one character, or have changed character over time; we should not try too hard to put square pegs in round holes. But we can make intelligent judgments



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

about which impulse moves a party's leaders, activists, and voters.

And we can make intelligent judgments about which parties have provided sustainable governance. Religious parties can work, but most countries in today's world have either no religions (like secular northern Europe) or too many (the United States) for one to govern. Liberal parties have had much success, but have tended to disappear from failure of nerve—they do not believe in anything strongly enough to fight for it. Socialist parties have governed ably in some countries, but, alas, socialism doesn't work, and socialist parties are fast disappearing. That leaves nationalist parties: not the nationalism of Hitler, of course, but the nationalism of Churchill, de Gaulle, and Roosevelt, nationalism that is open to various economic programs and compatible with cultural toleration. American nationalism, in particular, provides a basis for governance, for it is based not on land or race or ethnicity but on a set of abstract ideas and governmental arrangements which can be adapted and used in many national settings.

But these conclusions will not be obvious to every reader. So let us look in more detail at how each type of party has fared in the democracies of the past 160 years.

**Religious parties.** Many great historic parties began as religious parties. The English Tories and Whigs, for example, were formed around a dispute essentially religious in character: whether England could or should have a Catholic king. For at least a century after the emergence of these two groups in the 1680s, the Tories were the party of the established church and the hereditary monarch. The Whigs argued for a Protestant monarchy (whose hereditary claims were dubious) and latitude for dissenting churches. Two centuries later, William Gladstone's Liberals and Benjamin Disraeli's Conservatives were still bitterly opposed on religious issues.

American parties also had religious origins. The early, abortive party politics of the 1790s was based on attitudes toward the French Revolution, which is to say, religion or irreligion. Thomas Jefferson was routinely attacked as an atheist, while the Federalists had their main strength in New England, where they maintained state-established churches (in Connecticut, until as late as 1818).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In the 1830s Andrew Jackson's Democratic Party gained much support, notably from America's new Irish Catholic immigrants, for the party's policy of tolerating and celebrating religious diversity. In the mid-1850s the Republican Party was founded. It was primarily a party of the New England diaspora, of people no longer strict Congregationalists but informed by a set of beliefs that might be termed Emersonian or transcendentalist. They were imbued with a zeal of religious intensity against slavery, for women's rights, and against liquor.

In time the Conservatives and the Republicans outgrew their religious bases and ceased to remain religious parties. Under Disraeli, the Conservatives became a nationalist party, in British terms "imperialist." In the United States, Theodore Roosevelt converted the Republicans to an American nationalism, elevating such believers in an American version of imperialism as William Howard Taft, Elihu Root, Henry Stimson, and Frank Knox—the first of the "wise men" who dominated the conduct of American foreign policy from 1898 to 1968. Despite these changes, the nineteenth century Conservatives and Republicans demonstrate that religious parties can be successful electorally and can provide legitimate leadership for a diverse country.

More recent history shows that religious parties can be successful in the twentieth century. The prime examples are the Christian Democrats of Germany and Italy, both Catholic parties. These parties arose after the fall of Mussolini and Hitler and provided a solid base of conviction and a large constituency committed to defending democracy against totalitarians. In Italy, the religious base was large and the totalitarian threat internal: Italy's own Communists. In Germany, the religious base was somewhat smaller and the threat external: the Communists across the Iron Curtain.

Other examples of workable religious parties include various splinter groups in the Netherlands, Belgium, and Israel, all of which have proportional representation. These small parties serve roughly the same function as do party factions in countries which have majority-forcing electoral systems. It should be added that the divisive potential of religious parties is always present. This is evident in existing democracies such as Israel and India and could be a problem in various Islamic countries should they become democracies.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Religious parties depend for their vitality on the existence of genuine religious feeling. The decline of religious belief in Western Europe has contributed to the decline of religious parties, even those as tolerant and broadly based as the Christian Democrats. Italy's Christian Democrats have lost votes to many parties, especially regional splinters like the Lombard League. Germany's Christian Democrats have survived only by becoming a strong nationalist party.

In the United States religious belief is much stronger than in most advanced countries, but is also more variegated. A purely religious party does not seem a live possibility. But the specter is raised often, and not always with trepidation. In fact, intense religious belief has attached itself to both twentieth century American parties. Examples include William Jennings Bryan's Democrats, George McGovern's Democrats, and Ronald Reagan's Republicans.

Now there are again threats or promises (as different sides see them) of political activity by the religious right. Liberal organizations such as People for the American Way point to this with great foreboding, though one cannot see why it is any more dangerous to democracy than People for the American Way's own political activity. Indeed, some—many in the media, which is made up almost exclusively of cultural liberals and seculars—saw the Republican National Convention of 1992 as controlled by an intolerant religious right.

This is obviously hyperbole. Yet voters are in fact split along lines of religion. Exit polls show George Bush carried born-again Protestants 62 to 29 percent, and ran even against Bill Clinton among other white Protestants (39 to 39 percent), while Clinton led 78 to 10 percent among Jews, and 62 to 18 percent among those with no religious affiliation. These are astonishing differences, chasms that dwarf the differences between blue-collar and white-collar voters or between high-income and low-income voters.

It is possible that the Republican Party will continue to have a religious component, to be partly a party of the religious right, just as the Democratic Party will continue to have a religious component, to be partly a party of the secular, the unchurched, and the Jewish. But politicians of both parties understand the importance, in a majority-forcing electoral system such as ours,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of selecting leaders and taking positions that are not narrowly religion-based. President Bill Clinton is a Southern Baptist who speaks in the cadences of the King James Bible; Jack Kemp, a possible Republican nominee in 1996, is a man of the most self-evident non-bigotry, deeply sympathetic to blacks (with whom he worked closely in professional sports) and to Jews (he grew up in the heavily Jewish Fairfax neighborhood of Los Angeles).

The upshot is: Religious parties are not the wave of the future, in the United States or probably in any other advanced country. Instead, in an age of disbelief in Western Europe and East Asia and widely disparate beliefs in North America and South Asia, parties will attack their opponents by calling them religious.

**Liberal parties.** Here I mean liberal parties in their nineteenth or early twentieth century sense, parties that believe in tolerance and, to a greater or lesser degree, in economic free markets. These were the anticlerical parties of nineteenth-century Europe, who saw established churches as their prime enemy and celebrated the French Revolution as a blow for liberty. These were the Radicals and Radical Socialists in France, the Liberals in Britain, the Liberals and Republicans in Italy, and the laissez faire, cultural liberals who were dominant in Switzerland and the Netherlands.

Liberal parties have long seemed to many the most attractive parties. Historically, they have a fair claim to be the parties that produced the economic growth and cultural tolerance which graced important parts of the Atlantic world before 1914 and which seem to be on the march again today.

Yet history has not been kind to the liberal parties. If their strength is tolerance of diversity, their weakness is tolerance of anything—including their own destruction. If their strength is openness to economic ideas, their weakness is their embrace of almost any economic idea advanced as progressive, regardless of its actual effect: They like to have no enemies on the left. The liberal parties are the parties of skepticism, the parties of people who say they are unsure enough about basic principles that they are unwilling to force their basic principles on anyone. The unhappy corollary of this is that the liberal parties are—or were—unwilling to defend themselves. The liberal parties did not be-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

lieve in their own principles strongly enough to fight for them. And so they died—almost every single one, done in by socialism or nationalism or, horrifyingly often, by totalitarianism.

Look at the roll call. The Liberal Party of Britain: dominant in the elections of 1906 and 1910, the cocksure party of dazzling talents as World War I began (Herbert Asquith, Lloyd George, and Winston Churchill), dead by 1923, squeezed out between the nationalist Conservatives and the socialist Laborites. The United States: Grover Cleveland's Democratic Party was squeezed out between William McKinley's nationalist Republicans and William Jennings Bryan's proto-socialist Populists in 1896. Consider Italy's liberals and republicans: Mussolini, in a great bluff, threatens a march on Rome in 1922 and is handed over the government by a foolish king, with scarcely a liberal protest. Or think of Russia: In 1917 the liberal Kerensky, afraid of revolt from the right, destroys his loyal General Kornilov only to be destroyed by the revolutionary Lenin. Or Spain: Where nascent attempts at democracy were caught between anticlerical socialists and an authoritarian military, resulting in the Civil War of 1936-39 and authoritarian dictatorship for the next thirty-six years.

Then there is France, the country where "left" and "right" began (from the places various groups took in the Revolutionary Assembly). The weakness of the liberal parties here can be seen most vividly in the France of the 1930s and 1940s. The Radicals and Radical Socialists (the liberal politicians of liberal France) had grown used to success and to its spoils. They were the corrupt leaders of a country that had stopped growing demographically or economically, a country that as late as the 1940s and 1950s looked and lived much as it did in the 1880s and 1890s. In the Stavisky riots of February 1934, French liberal parliamentarians were almost swept aside by native fascists incensed over a financial scandal in which the liberals were indubitably culpable. An increasingly authoritarian right felt alienated from a country long run by anticlerical liberals, who in turn did not believe in their own system enough to effectively defend its economy against socialists or its country against invaders.

And so the liberal parties died from failure of nerve. The parties which in the late nineteenth century seemed the wave of the future were by 1940 things of the past.

Is there any future, or present, for liberal parties? In Europe their descendants occupy the interstices between socialist par-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ties, Christian Democrats, and Conservatives. Sometimes, as in Britain for a few months in 1966 and 1974, and in Germany since 1971, liberal parties have held the balance of power, determining which party leads the government. The new democracies of Eastern Europe may be developing liberal parties, in Hungary, in the Czech Republic, and perhaps elsewhere.

In the United States, the Democratic Party of the last twenty-five years has often had a liberal thrust. Cultural liberalism together with renunciation of an ever-growing welfare state has been the theme of Democratic presidential candidates for many years now, though the combination is still often hailed as a new one. Jimmy Carter, Jerry Brown, Gary Hart, Michael Dukakis, Bruce Babbitt, and Bill Clinton all sounded this theme, albeit with somewhat different lyrics, and with some considerable electoral success. Yet, it must be added, without sustainable success. The liberals' embrace of market economics has proved unsteady, and they have been unable to raise national morale as did Franklin Roosevelt and Ronald Reagan.

Bill Clinton will try, cheered on by his admirers in the national media. But he and they have a problem they do not recognize: their own failure of nerve, their unwillingness to defend their own beliefs from their enemies. This has been apparent in liberal responses to one foreign policy confrontation after another: They were willing to bargain rather than fight for the hostages held by Iran, they were willing to unilaterally disarm in response to the Soviet weapons buildup (remember the "nuclear freeze" and how it was going to prevent "the end of the earth"), they were enraged by our military intervention in Grenada and Panama, they opposed the Gulf war resolution (making the absurd argument that Saddam Hussein would give up Kuwait in response to economic pressure). All of these stances were for liberals a reprise of the issue they think of as Vietnam, which they misread as a war produced by mindlessly aggressive conservatives. In fact, this was the liberals' war, in which all the escalation came in Democratic administrations and all the deescalation in Republican administrations. This was a war which military leaders were cautious about entering but which newspaper correspondents like David Halberstam insisted that the United States must become more deeply involved in. Then, when the liberals got the war they wanted and it went wrong, they turned against their own war—and against their whole country as well.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

At home, these liberals rebelled against the conditions that were producing economic growth and ever-growing intellectual achievement: the stable family mores of the 1950s, and the rigorous academic standards adopted after Sputnik was launched in 1957. The late 1960s were filled with articulate laments about how America was warlike, by the people whose party made the war; about how America was racist, even as it was eliminating institutionalized racism and changing personal attitudes on race in a way no other nation had ever done; about how America was oppressing individuality, even as the country was becoming culturally more segmented and tolerant almost by the month. Those late 1960s attitudes continue to infect political liberals and the media and academe. Indeed these attitudes may now be at the peak of their influence, since the baby boom liberals in whom they are so strong are now our Cabinet members, newspaper editors, and university department heads.

What is plain, however, is that this kind of liberalism is no formula for governing. Jimmy Carter was destroyed because his administration (mostly) seemed guided by this kind of liberalism. Bill Clinton was elected because his candidacy (mostly) did not seem guided by this kind of liberalism. Clinton's inaugural speech was successful precisely because he did not sound the notes of this liberalism. Vietnam and the Vietnam era, such a heavy presence in Carter's inaugural speech, went unmentioned and unreferenced in Clinton's; instead, he talked of the long sweep of American history and of our half-century battle against totalitarianism. He talked not so much of personal liberation as of personal responsibility. Clinton was markedly less successful in the next two weeks, which were dominated by his advocacy of gays in the military and his botched attempts to appoint a female attorney general—clearly expressions of the liberal impulse which remains so strong in a feminist-dominated Democratic Party.

It can be predicted that Clinton will be an unsuccessful president if he is perceived as a predominantly liberal politician, with almost as much certainty as it can be predicted that a Republican will be an unsuccessful president if he is perceived as a predominantly religious politician.

**Socialist parties.** A century ago electoral democracies saw the sudden rise of socialist parties, which seemed ready to carry

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

all before them. Germany's Social Democrats were robust vote-getters in the 1890s, as Bismarck had feared they would be. The British Labor Party obtained representation in Parliament in 1900; by 1924 it had formed a government. French Socialists, though slower in gaining strength, produced the Popular Front premier Leon Blum by 1936.

As early as 1903, German academic Werner Sombart thought it worthwhile to write a book asking why there was no socialism in America. But it was not so clear there wouldn't be. Eugene Debs' Socialist Party polled nearly one million votes in 1912; politicians as shrewd as Theodore Roosevelt, William Howard Taft, and Woodrow Wilson favored government intervention in the economy, partly to forestall what they feared might otherwise be a vigorous socialist movement.

Social democratic parties in the years since have had a noble role in fighting totalitarianism and advancing freedom—Britain's Labor Party in the 1940s in particular. They have helped to build civil and in many ways successful societies in Scandinavia and the Low Countries. Yet today the socialist parties are in eclipse or aren't very socialist anymore. In France, Spain, Portugal, Australia, New Zealand, Argentina, and Mexico, socialist parties have won elections after privatizing state enterprises, reducing tax rates, and dismantling some welfare state protections. Where they stand even for maintaining current levels of government, much less expanding them, they have lost: Britain's Labor Party and the German Social Democrats are prime examples. Occasional exceptions—Ontario's New Democratic Party government, Lithuania's victory for the old Communists—seem to prove the rule. They are the result of odd electoral systems or local ruckuses.

The lesson seems to be that socialist parties can become capable of governing, by becoming less socialist. In the United States, the Democratic Party never became a fully socialist party in the first place. Franklin Roosevelt's First New Deal was intended to be temporary and mostly was, although some farm programs linger on. Roosevelt's Second New Deal—Social Security, the C.I.O. unions created by the Wagner Act, minimum wages—proved more enduring, but amounted to something well short of socialism. Roosevelt's Third New Deal—national economic planning, regional river authorities—turned out to be a nonstarter, with virtually no support from Democratic politicians.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Following Roosevelt, the Truman administration failed to extend government much except for incremental Social Security increases. The Kennedy-Johnson administration cut taxes instead of raising spending. The Johnson administration's antipoverty programs did more to destroy the efficacy of the public sector than to increase it. Attempts to provide a guaranteed income were made in the Nixon administration, not the Johnson administration, and failed.

Afterwards, Democrats desultorily acquiesced in raising public sector spending faster than the private sector grew. But missing from their rhetoric since the death of Hubert Humphrey in 1978, as it is missing from the rhetoric of most socialist parties today, is the idea that increasing government is a positive good, one capable of holding together a country and asserting the communitarian interests of an entire nation. At most, increasing government is depicted as a means of disciplining market forces: Listen to Hillary Rodham Clinton on health care. When graduated tax rates are seized on, as they were by Bill Clinton, it is as a means of mollifying voters for broad-based tax increases. In a country where upward mobility has been the common experience, it is natural that there is little political demand for redistribution of income.

Socialism was hailed by its founders in Europe and by the celebratory historians of our own New Deal as the inevitable wave of the future. Socialism's demise is a reminder that there is nothing more antique than yesterday's vision of the future—Tomorrowland soon became the most outdated part of Disneyland, and the first to be refurbished.

**Nationalist parties.** When most members of the American "chattering class" hear the word "nationalist," the first association that comes to mind is "Hitler," even though, as George Will has argued persuasively, Hitler was a totalitarian, not a nationalist. In any case, let it be clear: I am talking here about democratic nationalism. And the democratic nationalist tradition is a robust one. Winston Churchill, Charles de Gaulle, and Franklin Roosevelt were all nationalists, and so were their parties. Not only is it possible to have a vibrant and decent democratic nationalism, but there are many such examples.

Nationalist parties depend on the impulse of shared national pride. This is a common feeling, capable of holding a whole

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

people together in a way that the impulses animating religious, liberal, and socialist parties usually cannot. "Sartre, c'est aussi la France," de Gaulle once said—a sentiment Sartre surely would not have reciprocated if his Communists had come to power in Paris. Nationalist parties also embody faith. They foster that sense of a connection with the past—the belief that we are part of a long chain of individuals, connected by shared experiences and faith with those who have come before and those who will come after—which is one of the consolations of religion and one of the promises of socialism, but which liberalism, with its skepticism and taste for the new, cannot deliver. Nationalist parties have a faith also in the basic goodness of the nation that religious parties sometimes, and liberal and socialist parties usually, tend to undermine. This need not be a naive faith, or one blind to the shortcomings and sins of a society: Think of Abraham Lincoln, facing as squarely as any politician ever has the tension between the ideals of the country he had such faith in and its acceptance of a social institution he knew to be evil.

Nationalist parties sometimes evolve out of religious parties, typically when religious faith turns to unbelief: Churchill's Conservatives were once a religious party, and Germany's Christian Democrats have become a robust nationalist rather than Catholic party.

Nationalist parties are different in important ways from liberal parties. Because they assert belief in national values, they are less hospitable to skepticism and may be less observant of civil liberties than most Americans today would be comfortable with: Think of de Gaulle or Singapore's Lee Kwan Yew. Yet in the long run of history, Fifth Republic France and today's Singapore are among the freest regimes.

Nationalist parties are not necessarily believers in market economics, for the state after all is one of the few institutions which is clearly national in scope. Theodore Roosevelt's Republicans and Joseph Chamberlain's Unionists believed devoutly in protective tariffs and were not averse to economic regulation of industry. Nationalist parties may indeed verge on socialism, as did Franklin Roosevelt's Democrats.

The obvious danger of nationalist politics is chauvinism. Liberals and socialists have long recoiled against the idea of asserting that one nation is better than another, and not just because it sounds like schoolyard bragging. They point to the horrors of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

what one might call the 1914-1945 World War, which killed 100 million people and which was started in a clash of minor nationalisms. Nationalism can indeed be dangerous, but so can religion (think of the Hindu BJP), liberalism (France in 1940), and socialism. Albert Einstein, who spent most of his adult life in the shadow of the 1914-45 war, said "Nationalism is a childhood disease. It is the measles of the human race." But it was a nationalist politician, Franklin Roosevelt, who acted on Einstein's letter urging the development of nuclear energy, and who rallied the American people to roll back the tide of totalitarianism which nearly claimed Einstein as one of its one hundred million victims. The path of progress is not to go beyond nationalism. The important thing is to find nationalisms, and nationalist parties, that can work to build decent societies and a peaceful world.

## American nationalism

Fortunately, there is a nationalism capable of doing those things: American nationalism. It is a nationalism that is better than any other, because it has room for all the rest. The definition of an American has proved through our history to be happily elastic: Anyone can belong. Americanness has as its source not a plot of ground or a strand of genes, but a set of principles which assert the moral equality and human rights of every person. We should not feel shy about boasting of these principles just because they are our own. For the American nationalism to which we are the heirs is the product of happy accident and transcendent genius.

The happy accident is that the American political culture developed out of post-Glorious Revolution Britain, a polity where the ideas of toleration of dissent and the legitimacy of political opposition were greatly strengthened by the happenstance that politics revolved around two parties, both with a cloud on their title to legitimately represent the nation. The Tories were suspect because they were thought to yearn for a king whose Catholicism was regarded as profoundly foreign, and because they had made an easy peace with Britain's foreign enemies. The Whigs were suspect because their monarchs were mostly foreigners, and because their power rested heavily on corruption and manipulation of an antique franchise. Between the Whigs and the Tories, there evolved political theories asserting the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

principles of limited government and tolerance of opposition, theories that shaped the American revolutionaries' thinking in the 1770s and 1780s.

Since then, the principles of American nationalism have proved to be, as the Founders hoped, expandable and exportable. The great achievement of Franklin Roosevelt, as Joseph Alsop wrote, was to "include the excluded"—the poor, the immigrants, the factory workers, the unemployed, who before had somehow not seemed to be fully American. In the 1960s the election of a Catholic president and the success of the civil rights revolution certified that Catholics and blacks were Americans too.

Abroad, for much of this century the spread of American principles was fitful; they were trampled by totalitarians, eradicated in ethnic conflicts, and derided by Marxists. After Vietnam many American liberals came to see their country as an oppressive and reactionary force, preventing the peoples of the world from installing the leftist governments they supposedly wanted and which supposedly would improve their material standard of living.

Such views are not tenable today. American commentators could sneer at Ronald Reagan when he proclaimed that America had a special place among nations and stood for ideas that were morally preferable to those of the Soviets' evil empire. The same people have a harder time now that the people who lived in that empire have been allowed to speak, and have testified that Reagan was right; now that nations all over the world are following our example, adopting forms of government, economic arrangements, and policies which are modeled on the American way; now that Bill Clinton as well as Ronald Reagan is proclaiming the special worthiness of American ideals and principles.

We may be reaching a point now where both great American parties are nationalist. The Republican Party, economically elitist and querulously critical of our foreign policy in the 1930s, became a strong nationalist party in the 1950s, when Dwight Eisenhower committed it to the Truman-Acheson forward extension of American military power. The party got its tribune of nationalism in Ronald Reagan just as the Democrats had one in Franklin Roosevelt. The Democratic Party, steered toward liberalism and socialism by Vietnam-influenced liberals, may now be moving back toward nationalism under Bill Clinton. The United

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

States may be entering a happy period where it has two nationalist parties, with differing positions on important cultural and economic issues, but a fundamentally favorable outlook toward American nationalism, a condition we have not enjoyed since the mid-1960s.

American nationalism is also serving as a useful model for others. The nations defeated in World War II—Germany, Italy, and Japan—were all given political systems modeled to some extent on ours, and they developed parties that adapted principles of American nationalism to their own cultures. American-style nationalism based on abstract ideas, rather than chauvinistic nationalism based on parochial pride, seems to be on the rise in Western and Eastern Europe, and quite possibly in East Asia and Latin America. American political institutions and political freedoms have been spread to more countries than anyone could have imagined fifteen years ago. If it is true, as many think, that democratic countries do not go to war with one another, then those who have helped construct democracy and American-style nationalist parties in countries around the world have laid the groundwork for a peaceful and prosperous twenty-first century.

## The American century

It has long been the fashion in this country to mock the term "the American century," proclaimed by Henry Luce in February 1941 and in almost the same terms by Franklin Roosevelt in January 1941. Liberals entrapped in the Vietnam myth celebrated what they were smugly sure was the end of the American century; declinists like the diplomatic historian Paul Kennedy proclaimed that the American century would be ended by Caspar Weinberger's defense budgets.

But of course this is the American century, and what better kind of century could we imagine? We should remember that Roosevelt and Luce were not arguing that this must be the American century, but that it should be, because only the forward extension of American military power could roll back the tide of totalitarianism, which as they spoke had engulfed almost the whole landmass of Eurasia. And we should remember that Roosevelt and Luce wanted America to prevail because they were convinced that only by the advance of political freedom, religious toleration, and market capitalism could Americans and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

peoples around the world live decent lives in the second half of the twentieth century.

We should be thankful now that we are lucky enough to live in the second half of this American century, and that nationalist parties based on the American model are on the rise here and all over the world.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# Television and violent crime

BRANDON S. CENTERWALL

CHILDREN ARE born ready to imitate adult behavior. That they can, and do, imitate an array of adult facial expressions has been demonstrated in newborns as young as a few hours old, before they are even old enough to know that they have facial features. It is a most useful instinct, for the developing child must learn and master a vast repertoire of behavior in short order.

But while children have an instinctive desire to imitate, they do not possess an instinct for determining whether a behavior ought to be imitated. They will imitate anything, including behavior that most adults regard as destructive and antisocial. It may give pause for thought, then, to learn that infants as young as fourteen months demonstrably observe and incorporate behavior seen on television (Figure 1).

The average American preschooler watches more than twenty-seven hours of television per week. This might not be bad if these young children understood what they were watching. But they don't. Up through ages three and four, most children are



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

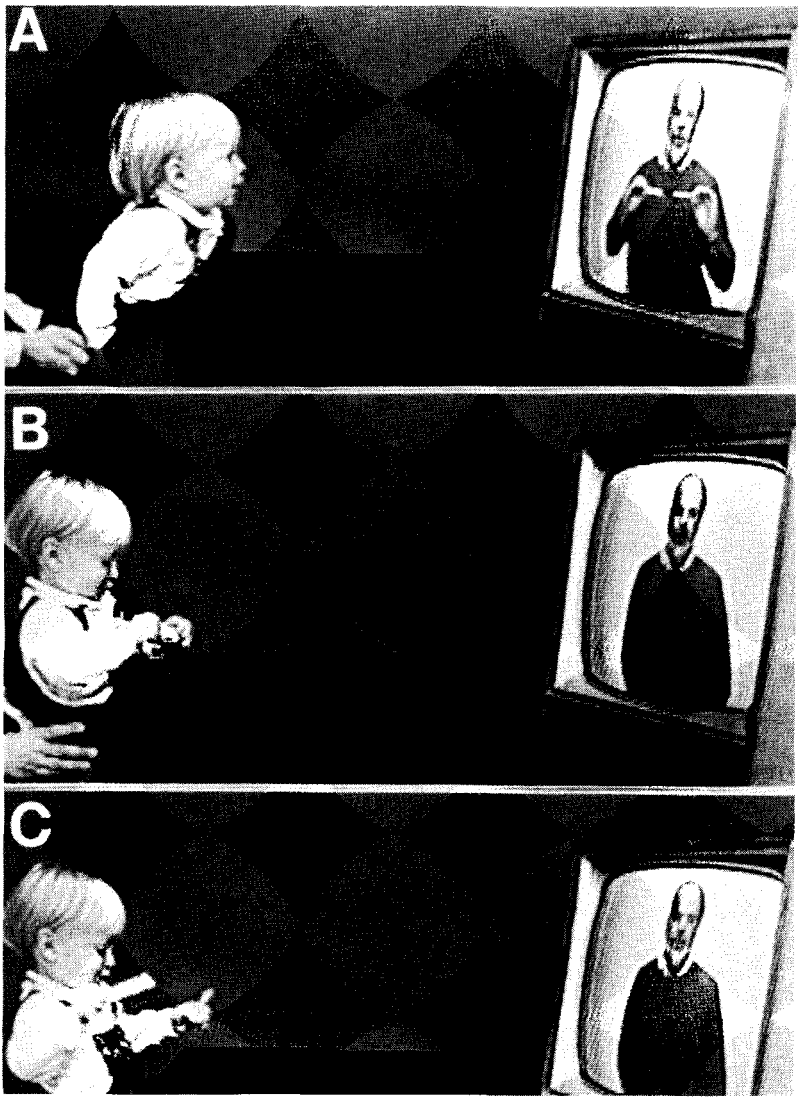


**Figure 1.** This series of photographs shows a fourteen-month-old boy learning from a television set. In photograph A the adult pulls apart a novel toy. The infant leans forward and carefully studies the adult's actions. In photograph B the infant is given the toy. In photograph C the infant pulls the toy apart, imitating what he saw the adult do. Sixty-five percent of infants exposed to the instructional video could later work the toy, as compared to 20 percent of infants who were not exposed. (Reprinted by permission from Andrew N. Meltzoff, "Memory in infancy," *Encyclopedia of Learning and Memory*. New York: Macmillan, 1992. Photo by A. N. Meltzoff.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

unable to distinguish fact from fantasy on TV, and remain unable to do so despite adult coaching. In the minds of young children, television is a source of entirely factual information regarding how the world works. There are no limits to their credulity. To cite one example, an Indiana school board had to issue an advisory to young children that, no, there is no such thing as Teenage Mutant Ninja Turtles. Children had been crawling down storm drains looking for them.

Naturally, as children get older, they come to know better, but their earliest and deepest impressions are laid down at an age when they still see television as a factual source of information about the outside world. In that world, it seems, violence is common and the commission of violence is generally powerful, exciting, charismatic, and effective. In later life, serious violence is most likely to erupt at moments of severe stress—and it is precisely at such moments that adolescents and adults are most likely to revert to their earliest, most visceral sense of the role of violence in society and in personal behavior. Much of this sense will have come from television.

## The seeds of aggression

In 1973, a remote rural community in Canada acquired television for the first time. The acquisition of television at such a late date was due to problems with signal reception rather than any hostility toward TV. As reported in *The Impact of Television* (1986), Tannis Williams and her associates at the University of British Columbia investigated the effect of television on the children of this community (which they called "Notel"), taking for comparison two similar towns that already had television.

The researchers observed forty-five first- and second-graders in the three towns for rates of inappropriate physical aggression before television was introduced into Notel. Two years later, the same forty-five children were observed again. To prevent bias in the data, the research assistants who collected the data were kept uninformed as to why the children's rates of aggression were of interest. Furthermore, a new group of research assistants was employed the second time around, so that the data gatherers would not be biased by recollections of the children's behavior two years earlier.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Rates of aggression did not change in the two control communities. By contrast, the rate of aggression among Notel children increased 160 percent. The increase was observed in both boys and girls, in those who were aggressive to begin with and in those who were not. Television's enhancement of noxious aggression was entirely general and not limited to a few "bad apples."

In another Canadian study, Gary Granzberg and his associates at the University of Winnipeg investigated the impact of television upon Indian communities in northern Manitoba. As described in *Television and the Canadian Indian* (1980), forty-nine third-, fourth-, and fifth-grade boys living in two communities were observed from 1973, when one town acquired television, until 1977, when the second town did as well. The aggressiveness of boys in the first community increased after the introduction of television. The aggressiveness of boys in the second community, which did not receive television then, remained the same. When television was later introduced in the second community, observed levels of aggressiveness increased there as well.

In another study conducted from 1960 to 1981, Leonard Eron and L. Rowell Huesmann (then of the University of Illinois at Chicago) followed 875 children living in a semirural U.S. county. Eron and Huesmann found that for both boys and girls, the amount of television watched at age eight predicted the seriousness of criminal acts for which they were convicted by age thirty (Figure 2). This remained true even after controlling for the children's baseline aggressiveness, intelligence, and socioeconomic status. Eron and Huesmann also observed second-generation effects. Children who watched much television at age eight later, as parents, punished their own children more severely than did parents who had watched less television as children. Second- and now third-generation effects are accumulating at a time of unprecedented youth violence.

All seven of the U.S. and Canadian studies of prolonged childhood exposure to television demonstrate a positive relationship between exposure and physical aggression. The critical period is preadolescent childhood. Later exposure does not appear to produce any additional effect. However, the aggression-enhancing effect of exposure in pre-adolescence extends into adolescence and adulthood. This suggests that any interventions should be

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

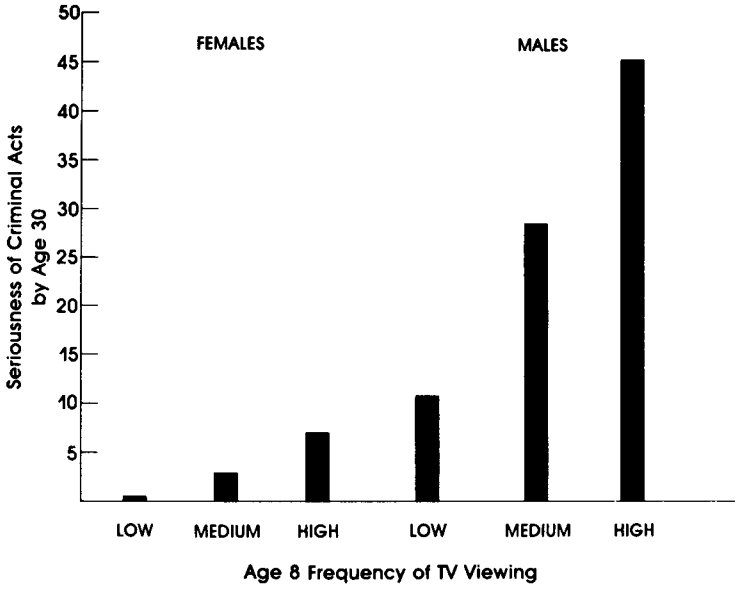


**Figure 2.** Relationship of television viewing frequency at age eight to seriousness of crimes committed by age thirty. Columbia County Cohort Study, 1960-1981. (Reprinted by permission from Leonard D. Eron and L. Rowell Huesmann, "The control of aggressive behavior by changes in attitudes, values, and the conditions of learning," *Advances in the Study of Aggression*. Orlando, Florida: Academic Press, 1984.)

designed for children and their caregivers rather than for the general adult population.

These studies confirmed the beliefs of most Americans. According to a Harris poll at the time of the studies, 43 percent of American adults believe that television violence "plays a part in making America a violent society." An additional 37 percent think it might. But how important is television violence? What is the effect of exposure upon entire populations? To address this question, I took advantage of an historical accident—the absence of television in South Africa prior to 1975.

## The South African experience

White South Africans have lived in a prosperous, industrialized society for decades, but they did not get television until 1975 because of tension between the Afrikaner- and English-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

speaking communities. The country's Afrikaner leaders knew that a South African television industry would have to rely on British and American shows to fill out its programming schedule, and they felt that this would provide an unacceptable cultural advantage to English-speaking South Africans. So, rather than negotiate a complicated compromise, the government simply forbade television broadcasting. The entire population of two million whites—rich and poor, urban and rural, educated and uneducated—was thus excluded from exposure to television for a quarter century after the medium was introduced in the United States.

In order to determine whether exposure to television is a cause of violence, I compared homicide rates in South Africa, Canada, and the United States. Since blacks in South Africa live under quite different conditions than blacks in the United States, I limited the comparison to white homicide rates in South Africa and the United States, and the total homicide rate in Canada (which was 97 percent white in 1951).† I chose the homicide rate as a measure of violence because homicide statistics are exceptionally accurate.

From 1945 to 1974, the white homicide rate in the United States increased 93 percent. In Canada, the homicide rate increased 92 percent. In South Africa, where television was banned, the white homicide rate declined by 7 percent (Figure 3).

## Controlling for other factors

Could there be some explanation other than television for the fact that violence increased dramatically in the U.S. and Canada while dropping in South Africa? I examined an array of alternative explanations. None is satisfactory:

• ***Economic growth.*** Between 1946 and 1974, all three countries experienced substantial economic growth. Per capita income increased by 75 percent in the United States, 124 percent in Canada, and 86 percent in South Africa. Thus differences in economic growth cannot account for the different homicide trends in the three countries.

†The "white homicide rate" refers to the rate at which whites are the victims of homicide. Since most homicide is intra-racial, this closely parallels the rate at which whites commit homicide.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

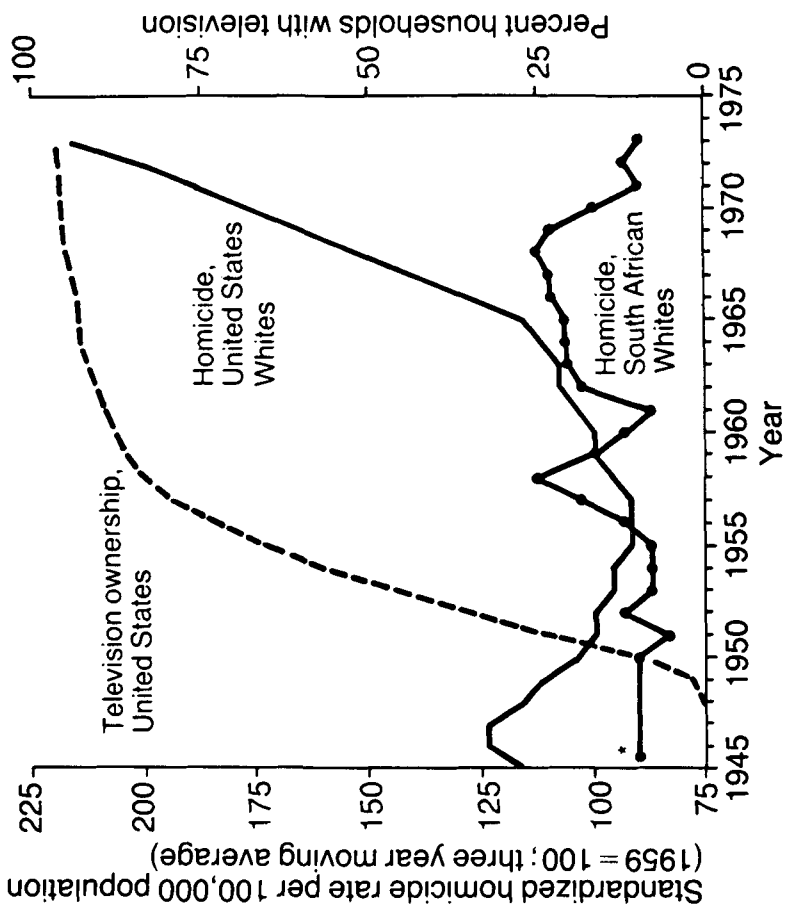


**Figure 3.** Television ownership and white homicide rates, United States and South Africa, 1945 through 1973. Asterisk denotes 6-year average. Note that television broadcasting was not permitted in South Africa prior to 1975. (Reprinted by permission from Brandon S. Centerwall, "Exposure to television as a cause of violence," *Public Communication and Behavior*, Vol. 2. Orlando, Florida: Academic Press, 1989.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

• ***Civil unrest.*** One might suspect that anti-war or civil-rights activity was responsible for the doubling of the homicide rate in the United States during this period. But the experience of Canada shows that this was not the case, since Canadians suffered a doubling of the homicide rate without similar civil unrest.

Other possible explanations include changes in age distribution, urbanization, alcohol consumption, capital punishment, and the availability of firearms. As discussed in *Public Communication and Behavior* (1989), none provides a viable explanation for the observed homicide trends.

In the United States and Canada, there was a lag of ten to fifteen years between the introduction of television and a doubling of the homicide rate. In South Africa, there was a similar lag. Since television exerts its behavior-modifying effects primarily on children, while homicide is primarily an adult activity, this lag represents the time needed for the "television generation" to come of age.

The relationship between television and the homicide rate holds *within* the United States as well. Different regions of the U.S., for example, acquired television at different times. As we would expect, while all regions saw increases in their homicide rates, the regions that acquired television first were also the first to see higher homicide rates.

Similarly, urban areas acquired television before rural areas. As we would expect, urban areas saw increased homicide rates several years before the occurrence of a parallel increase in rural areas.

The introduction of television also helps explain the different rates of homicide growth for whites and minorities. White households in the U.S. began acquiring television sets in large numbers approximately five years before minority households. Significantly, the white homicide rate began increasing in 1958, four years before a parallel increase in the minority homicide rate.

Of course, there are many factors other than television that influence the amount of violent crime. Every violent act is the result of a variety of forces coming together—poverty, crime, alcohol and drug abuse, stress—of which childhood TV exposure is just one. Nevertheless, the evidence indicates that if, hypothetically, television technology had never been developed, there

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

would today be 10,000 fewer homicides each year in the United States, 70,000 fewer rapes, and 700,000 fewer injurious assaults. Violent crime would be half what it is.

## The television industry takes a look

The first congressional hearings on television and violence were held in 1952, when not even a quarter of U.S. households owned television sets. In the years since, there have been scores of research reports on the issue, as well as several major government investigations. The findings of the National Commission on the Causes and Prevention of Violence, published in 1969, were particularly significant. This report established what is now the broad scientific consensus: Exposure to television increases rates of physical aggression.

Television industry executives were genuinely surprised by the National Commission's report. What the industry produced was at times unedifying, but physically harmful? In response, network executives began research programs that collectively would cost nearly a million dollars.

CBS commissioned William Belson to undertake what would be the largest and most sophisticated study yet, an investigation involving 1,565 teenage boys. In *Television Violence and the Adolescent Boy* (1978), Belson controlled for one hundred variables, and found that teenage boys who had watched above-average quantities of television violence before adolescence were committing acts of serious violence (e.g., assault, rape, major vandalism, and abuse of animals) at a rate 49 percent higher than teenage boys who had watched below-average quantities of television violence. Despite the large sum of money they had invested, CBS executives were notably unenthusiastic about the report.

ABC commissioned Melvin Heller and Samuel Polsky of Temple University to study young male felons imprisoned for violent crimes (e.g., homicide, rape, and assault). In two surveys, 22 and 34 percent of the young felons reported having consciously imitated crime techniques learned from television programs, usually successfully. The more violent of these felons were the most likely to report having learned techniques from television. Overall, the felons reported that as children they had watched an average of six hours of television per day—approxi-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

mately twice as much as children in the general population at that time.

Unlike CBS, ABC maintained control over publication. The final report, *Studies in Violence and Television* (1976), was published in a private, limited edition that was not released to the general public or the scientific community.

NBC relied on a team of four researchers, three of whom were employees of NBC. Indeed, the principal investigator, J. Ronald Milavsky, was an NBC vice president. The team observed some 2,400 schoolchildren for up to three years to see if watching television violence increased their levels of physical aggressiveness. In *Television and Aggression* (1982), Milavsky and his associates reported that television violence had no effect upon the children's behavior. However, every independent investigator who has examined their data has concluded that, to the contrary, their data show that television violence did cause a modest increase of about 5 percent in average levels of physical aggressiveness. When pressed on the point, Milavsky and his associates conceded that their findings were consistent with the conclusion that television violence increased physical aggressiveness "to a small extent." They did not concede that television violence actually caused an increase, but only that their findings were consistent with such a conclusion.

The NBC study results raise an important objection to my conclusions. While studies have repeatedly demonstrated that childhood exposure to television increases physical aggressiveness, the increase is almost always quite minor. A number of investigators have argued that such a small effect is too weak to account for major increases in rates of violence. These investigators, however, overlook a key factor.

Homicide is an extreme form of aggression—so extreme that only one person in 20,000 committed murder each year in the United States in the mid-1950s. If we were to rank everyone's degree of physical aggressiveness from the least aggressive (Mother Theresa) to the most aggressive (Jack the Ripper), the large majority of us would be somewhere in the middle and murderers would be virtually off the chart (Figure 4). It is an intrinsic property of such "bell curve" distributions that small changes in the average imply major changes at the extremes. Thus, if exposure to television causes 8 percent of the population to shift

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

from below-average aggression to above-average aggression, it follows that the homicide rate will double. The findings of the NBC study and the doubling of the homicide rate are two sides of the same coin.

After the results of these studies became clear, television industry executives lost their enthusiasm for scientific research. No further investigations were funded. Instead, the industry turned to political management of the issue.

### The television industry and social responsibility

The television industry routinely portrays individuals who seek to influence programming as un-American haters of free speech. In a 1991 letter sent to 7,000 executives of consumer product companies and advertising agencies, the president of the Network Television Association explained:

> Freedom of expression is an inalienable right of all Americans vigorously supported by ABC, CBS, and NBC. However, boycotts and so-called advertiser "hit lists" are attempts to manipulate our free society and democratic process.

The letter went on to strongly advise the companies to ignore all efforts by anyone to influence what programs they choose to sponsor. By implication, the networks themselves should ignore all efforts by anyone to influence what programs they choose to produce.

But this is absurd. All forms of public discourse are attempts to "manipulate" our free society and democratic process. What else could they be? Consumer boycotts are no more un-American than are strikes by labor unions. The Network Television Association is attempting to systematically shut down all discourse between viewers and advertisers, and between viewers and the television industry. Wrapping itself in patriotism, the televison industry's response to uppity viewers is to put them in their place. If the industry and advertisers were to actually succeed in closing the circle between them, the only course they would leave for concerned viewers would be to seek legislative action.

In the war against tobacco, we do not expect help from the tobacco industry. If someone were to call upon the tobacco

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

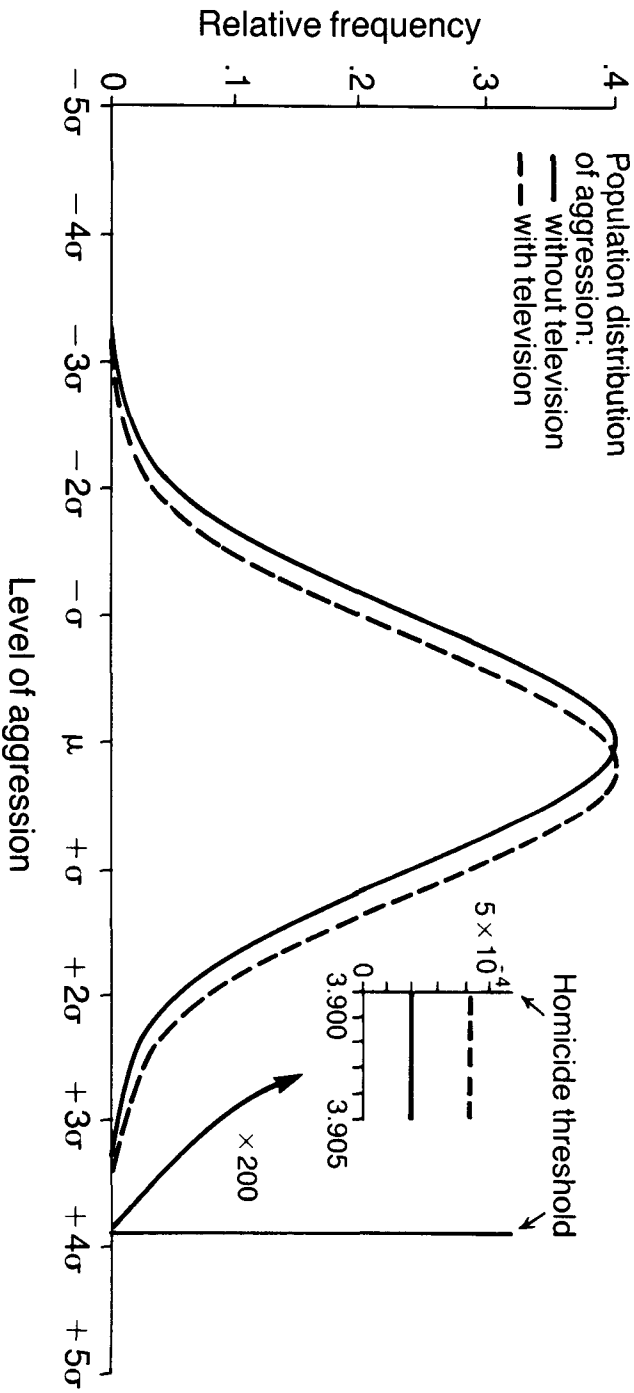


**Figure 4.** Relationships between television, aggression, and homicide in the general population: a model. (Reprinted by permission of Academic Press.)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

industry to cut back production as a matter of social conscience and concern for public health, we would regard that person as simple-minded, if not frankly deranged. Oddly enough, however, people have persistently assumed that the television industry is somehow different—that it is useful to appeal to its social conscience. This was true in 1969 when the National Commission on the Causes and Prevention of Violence published its recommendations for the television industry. It was equally true in 1989 when the U.S. Congress passed an anti-violence bill that granted television industry executives the authority to hold discussions on the issue of television violence without violating antitrust laws. Even before the law was passed, the four networks stated that there would be no substantive changes in their programming. They have been as good as their word.

For the television industry, issues of "quality" and "social responsibility" are peripheral to the issue of maximizing audience size—and there is no formula more tried and true than violence for generating large audiences. To television executives, this is crucial. For if advertising revenue were to decrease by just 1 percent, the television industry would stand to lose $250 million in revenue annually. Thus, changes in audience size that appear trivial to most of us are regarded as catastrophic by the industry. For this reason, industry spokespersons have made innumerable protestations of good intent, but nothing has happened. In the more than twenty years that levels of television violence have been monitored, there has been no downward movement. There are no recommendations to make to the television industry. To make any would not only be futile but could create the false impression that the industry might actually do something constructive.

On December 11, 1992, the networks finally announced a list of voluntary guidelines on television violence. Curiously, reporters were unable to locate any network producers who felt the new guidelines would require changes in their programs. That raises a question: Who is going to bell the cat? Who is going to place his or her career in jeopardy in order to decrease the amount of violence on television? It is hard to say, but it may be revealing that when Senator Paul Simon held the press conference announcing the new inter-network agreement, no industry executives were present to answer questions.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

## Meeting the challenge

Television violence is everybody's problem. You may feel assured that your child will never become violent despite a steady diet of television mayhem, but you cannot be assured that your child won't be murdered or maimed by someone else's child raised on a similar diet.

The American Academy of Pediatrics recommends that parents limit their children's television viewing to one to two hours per day. But why wait for a pediatrician to say it? Limiting children's exposure to television violence should become part of the public health agenda, along with safety seats, bicycle helmets, immunizations, and good nutrition. Part of the public health approach should be to promote child-care alternatives to the electronic babysitter, especially among the poor.

Parents should also guide what their children watch and how much. This is an old recommendation that can be given new teeth with the help of modern technology. It is now feasible to fit a television set with an electronic lock that permits parents to preset the channels and times for which the set will be available; if a particular program or time of day is locked, the set will not operate then. Time-channel locks are not merely feasible; they have already been designed and are coming off the assembly line.

The model for making them widely available comes from closed-captioning circuitry, which permits deaf and hard-of-hearing persons access to television. Market forces alone would not have made closed-captioning available to more than a fraction of the deaf and hard-of-hearing. To remedy this problem, Congress passed the Television Decoder Circuitry Act in 1990, which requires that virtually all new television sets be manufactured with built-in closed-captioning circuitry. A similar law should require that all new television sets be manufactured with built-in time-channel lock circuitry—and for a similar reason. Market forces alone will not make this technology available to more than a fraction of households with children and will exclude most poor families, the ones who suffer the most from violence. If we can make television technology available to benefit twenty-four million deaf and hard-of-hearing Americans, surely we can do no less for the benefit of fifty million American children.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A final recommendation: Television programs should be accompanied by a violence rating so that parents can judge how violent a program is without having to watch it. Such a rating system should be quantitative, leaving aesthetic and social judgments to the viewers. This approach would enjoy broad popular support. In a *Los Angeles Times* poll, 71 percent of adult Americans favored the establishment of a TV violence rating system. Such a system would not impinge on artistic freedom since producers would remain free to produce programs with high violence ratings. They could even use high violence ratings in the advertisements for their shows.

None of these recommendations would limit freedom of speech. That is as it should be. We do not address the problem of motor vehicle fatalities by calling for a ban on cars. Instead, we emphasize safety seats, good traffic signs, and driver education. Similarly, to address the problem of television-inspired violence, we need to promote time-channel locks, program rating systems, and viewer education about the hazards of violent programming. In this way we can protect our children and our society.

## REFERENCES

*Following is a partial list of studies and articles on this topic.*

William A. Belson, *Television Violence and the Adolescent Boy*. Westmead, England: Saxon House (1978).

Brandon S. Centerwall, "Exposure to Television as a Cause of Violence," *Public Communication and Behavior*, Vol. 2. Orlando, Florida: Academic Press (1989), pp. 1-58.

Leonard D. Eron and L. Rowell Huesmann, "The Control of Aggressive Behavior by Changes in Attitudes, Values, and the Conditions of Learning," *Advances in the Study of Aggression*. Orlando, Florida: Academic Press (1984), pp. 139-171.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Gary Granzberg and Jack Steinbring (eds.), *Television and the Canadian Indian.* Winnipeg, Manitoba: University of Winnipeg (1980).

L. Rowell Huesmann and Leonard D. Eron, *Television and the Aggressive Child.* Hillsdale, New Jersey: Lawrence Erlbaum Associates (1986), pp. 45-80.

Candace Kruttschnitt, et al., "Family Violence, Television Viewing Habits, and Other Adolescent Experiences Related to Violent Criminal Behavior," *Criminology*, Vol. 24 (1986), pp. 235-267.

Andrew N. Meltzoff, "Memory in Infancy," *Encyclopedia of Learning and Memory.* New York: Macmillan (1992), pp. 271-275.

J. Ronald Milavsky, et al., *Television and Aggression.* Orlando, Florida: Academic Press (1982).

Jerome L. Singer, et al., "Family Patterns and Television Viewing as Predictors of Children's Beliefs and Aggression," *Journal of Communication*, Vol. 34, No. 2 (1984), pp. 73-89.

Tannis M. Williams (ed.), *The Impact of Television.* Orlando, Florida: Academic Press (1986).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# A conservative case for judicial activism

DAVID P. BRYDEN

Conservatives sometimes remark that liberals would be less enamored of judicial activism if it were employed on behalf of conservative causes. A powerful polemical point, surely, but not one that has caused much insomnia in Cambridge.

For the premise of the argument—that conservative Justices might fashion an array of novel "conservative rights"—is known to be an almost entirely empty threat. Most conservatives reject that sort of activism, and so does the Rehnquist Court. When conservatives fault the Court, it is not for failing to create conservative rights, but for occasionally reaffirming liberal rights such as the right to abortion.

I have much sympathy for this view. I agree that the Court's role should, ideally, be narrowly circumscribed. In defending

*I am most grateful to Michael Zuckert, John Cound, Larry Alexander, Stanley Brubaker, Robert Nagel, Paul Meehl, John Dolan, Richard Morgan, and Linda Shimmin.*



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

this ideal, however, conservatives have neglected to ask whether it is attainable—a curious omission for those who habitually accuse liberals of wishful thinking.

I will offer here some friendly criticisms of conventional conservative jurisprudence. My purpose is to acknowledge the political realities of constitutional adjudication, without sacrificing what is authentic and valuable in the concepts of neutral principles and the rule of law.

## Framing the question

Scholars of all political creeds have assumed that the basic question in constitutional jurisprudence is: How should the Supreme Court interpret the Constitution? We do not ask how an individual Justice should interpret the Constitution, but rather how "the Court" should do so. There are obvious reasons for this. Judicial decisions are usually the product of at least some collective deliberation, and are handed down not as the edicts of individuals, nor even of a dominant majority, but rather in the name of the court. Yet the question of how a "court" should decide cases is—in an important sense—unrealistic. Courts don't think; individuals do. Even when Justices act in concert, their collective decisions require antecedent individual decisions.

Of course, in most legal contexts the convention that leads us to discuss what "a court" ought to do, rather than what an individual judge should do, is convenient and harmless. There is no important difference between the two. If we know how "a court" should decide an issue of contract law, then we know how an individual judge should decide the same issue. In the field of constitutional law, I will suggest, this is far less true. In constitutional law, unlike most other branches of law, there is no judicial consensus on the ground rules and aims of the enterprise. In constitutional law, liberal and conservative judges are not always playing by the same rules.

Mainstream conservatives believe that the most fundamental norm of constitutional adjudication is "judicial restraint." This is a loose term that I will define as a court's refusal, for principled reasons, to exceed its proper authority and role. Conservatives justify judicial restraint chiefly on two grounds. First, they argue that restraint is often required by the Justices' obli-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

gation to apply the original meaning of the Constitution ("originalism"), rather than engage in "result-oriented" judging. And second, conservatives believe that by confining the role of courts, judicial restraint preserves federalism and democracy.

These are the standard justifications for judicial restraint. My question is this: Do these justifications lose validity, for any individual Justice, if he or she discovers that most other Justices do not accept them?

## Right, wrong, and in-between

In everyday life we commonly distinguish between courses of action that are right regardless of how others behave, and those that are right only if many or most others follow them. It is wrong, for example, for a prison guard to treat prisoners brutally. Such conduct does not cease to be wrong if all the other guards are brutal. It is also wrong to steal, even if you live in a neighborhood where theft is rampant. But often the propriety of conduct is affected by the practices of others, especially of one's competitors:

• A professor may believe that, ideally, teachers should devote most of their time to teaching, and far less to research. After observing his colleagues' behavior, however, he may reverse these priorities in order to maintain his standing in the profession.

• Assume the same professor is a conservative in a department dominated by leftists. For many years, they have discriminated against conservatives in hiring decisions. The professor may decide to oppose the hiring of leftist candidates, even though he believes that ideally professors should be hired without regard to their political views.

• A corporation that wishes to do business in a country where bribes are necessary to obtain the requisite permits, may engage in bribery even though the company's directors and officers deplore the custom and would abolish it if they could.

• A senator who opposes filibusters in principle, but observes that the other party has filibustered against bills he favors, may decide to filibuster against some of the other party's bills.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

• Just Cause, a public interest group, may believe that ideally no politician should obtain money from a political action committee. But since such committees are lawful, and have been formed by other groups that compete for politicians' favors, the members of Just Cause may decide to form their own political action committee.

Each of these choices is debatable, but in practice most people make the kinds of decisions that I have suggested because they are unwilling to place themselves or their causes at a competitive disadvantage.

The question for conservative jurists is this: Is the wrong of judicial activism absolute, like the wrong of brutality toward a prisoner, or is it more like one of these other hypothetical cases? Surprisingly, discussions of constitutional interpretation regularly ignore this fundamental question. All major constitutional theorists seem to assume that a Justice should interpret the Constitution in whatever fashion—originalist or nonoriginalist, activist or restraintist—the theorist believes to be proper for the Court as a whole, without considering the contrary practices of other Justices. If a theorist believes, as conservatives commonly do, that most twentieth-century Justices have rejected his theory, he concludes that the nation needs new Justices, not that he himself needs a new theory.

Is it true that the obligation of a Justice to interpret the Constitution properly is unconditional? Let us consider two hypothetical cases.

## Justice New's dilemma

Justice New has recently joined the Supreme Court. He is, we will assume, a man of conservative political opinions. Concerning jurisprudential theories, however, he is unusually open-minded.

*Case One.* In the first case that comes before Justice New, the petitioner is a liberal Democrat who has been fined for violating an ordinance that prohibits the distribution of "scurrilous literature." The petitioner handed out a pamphlet that denounced Republicans as "white-collar racists" and urged voters to elect a Democratic town council.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This is about as easy as a constitutional case can be. Despite his political differences with the pamphleteer, our Justice will doubtless vote to reverse the conviction. Why? The obvious reasons are freedom of speech, fidelity to precedent, and the rule of law. But there is another reason. Justice New knows that liberal judges will vote to protect conservatives' speech in analogous cases, and he prefers a society in which both parties observe this rule to one in which they lawlessly fight, case by case, to establish a one-party reign of censorship. He believes in a "neutral principle" of freedom of speech, but his commitment to that principle may be, at bottom, conditional. In a society where the opposing party's judges did not respect his party's right to speak, he might not respect theirs.

Justice New also knows that by and large other Justices of every political persuasion apply all rules of law—not just freedom of speech—impartially to political friends and foes, to men and women, to whites and blacks. He gladly joins this tradition, preferring it to a dog-eat-dog struggle for absolute power. Again, he is subscribing to a neutral principle, but his adherence to that principle may again be conditional. If his political opponents were to reject the principle with sufficent consistency, duration, and consequence, he might reciprocate.

*Case Two.* Justice New's next case is more difficult. Mary and John O'Brien have asked the Court to invalidate a school financing system that requires them to pay taxes to support free public schools, but that does not compensate them for the cost of the parochial school education they prefer for their children. The O'Briens allege that this system deprives them of liberty and property without due process of law, infringes the reserved rights of the people under the Ninth Amendment, and violates the free exercise of religion clause.

At least as a matter of legislative policy, Justice New agrees with the O'Briens. He knows that few rights are more fundamental than the right to shape one's children's education, and he believes that religious parents should have the right to choose a religious school without having to pay the state for the secular education that they reject. He believes, moreover, that competition improves education just as it does other services; by subsidizing public schools the government reduces educational

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

quality. Therefore, New favors school voucher systems that compensate parents for the cost of private schooling. But he is doubtful that the Constitution dictates this result.

One of Justice New's clerks points out that several precedents lend some support to the O'Briens' constitutional argument. Although none of the cases is squarely on point, they are about as pertinent as *Griswold v. Connecticut* was in *Roe v. Wade*.

New believes *Roe* and *Griswold* were activist decisions that lacked any solid constitutional foundation. Yet both decisions have recently been reaffirmed. The Court has assumed the power to act without clear constitutional warrant, New observes, and there seems to be no prospect that it will abandon that power. What bearing does this have on New's vote in the *O'Brien* case?

To answer this question, we need to consider the major arguments for judicial restraint (rule of law and deference to democracy), and whether Justice New should feel bound by them even in situations where most liberals do not.

## The rule of law

By their very nature, purely legal reasons for judicial restraint lose much of their force unless most judges obey them, or can eventually be persuaded to do so. The rule of law requires a critical mass, a threshold below which some of its values cannot even partially be achieved.

Equal treatment of litigants, avoidance of arbitrariness, predictable decisions—all of these goals require a high degree of judicial consensus. A Court on which only three of the Justices were influenced by a particular type of legal authority (such as the Framers' intentions) would probably not be one-third as predictable as one on which all nine Justices followed that authority. Indeed, a Court that was one-third originalist might be more erratic in some fields than one whose decisions were based solely on the well-known prejudices of nine politician-lawyers.

Insofar as his goal is to maintain the rule of law, Justice New needs to know not just whether the Court ought to practice originalism, but whether it actually does. Ironically, the more he accepts the conservative charge that liberal Justices have repeatedly ignored the original meaning of the Constitu-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion, the more he must reject the conservative assumption that Justices are required by the rule of law to be faithful to that meaning.

Constitutional thinkers seem to agree that some of the Justices are originalists. Clashes between originalists and nonoriginalists, we are given to understand, occur regularly on the Court, and not merely in the law schools.

But who are these originalists? Few scholars have paused to draw up a list. To do so, one should distinguish—as scholars hardly ever do—between votes that were in all likelihood determined by an originalist approach to judging, on the one hand, and votes that were merely coincidentally originalist, on the other. If all it takes to be an originalist is a vote that coincides with the Framers' intentions, then all Justices are at least part-time originalists.

A true originalist, however, feels bound by the original meaning even when he disagrees with it. For this reason, one cannot cite Chief Justice Rehnquist's votes in capital cases as examples of his "following" or "adhering to" the Framers' intentions. Since Rehnquist is a devoted conservative, we would expect him to uphold capital punishment even if he were a thoroughgoing legal realist who rejected any obligation to follow the Constitution. We have no reason, in such cases, to applaud Rehnquist's "judicial restraint." His restraint is not tested.

By the same token, it would be misleading to cite the Marshall Court as an exemplar of originalism. If the decisions of the Marshall Court were more in accord with the Framers' intentions than were those of the Warren Court, it does not follow that Marshall and his brethren were more restrained. Their "originalism" may have been due to the fact that they held socioeconomic views that coincided with the Framers' (or because they had a much smaller corpus of anti-originalist precedents to deal with), and not because they exercised greater self-restraint in interpreting the Constitution.

In order to conclude that authentic originalism exists, we need to find Justices who seem to have voted against their personal political convictions, not out of a sense of prudence, nor even out of fidelity to precedent or democracy, but out of a sense of duty to enforce the original meaning of the Constitution.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In cases where the text of the Constitution is clear, there is a great deal of evidence that the Court's decisions have at least sometimes been affected by the wishes of the Framers. Nobody ever argues, for example, that the Court should "adapt the Constitution to modern conditions" by holding that the president's term is now eight years. Where the text is unclear, however—as it is in our *O'Brien* case—I see no evidence that more than an occasional Justice has been swayed by research into the Framers' imperfectly expressed intentions. Indeed, it is difficult to think of a single major case in the entire history of the Court in which the Framers' ambiguously expressed intentions seem to have been decisive.

But resolving all doubts as generously as possible, let us assume that of today's Justices, Rehnquist, Scalia, and Thomas are all consistent, authentic originalists. That strikes me as insufficient originalism to supply the requisite critical mass. Lacking that (and, in many cases, lacking consensus even among originalists), the argument that originalism promotes consistent, predictable decisions is weak. Therefore, Justice New should not feel obligated by the rule of law to cast his vote in accordance with the original meaning of the Constitution, even if he can ascertain its meaning for this case.

## Democratic values

In most constitutional cases, the best arguments against judicial intervention are based not on the rule of law, but on democratic values. Justice New dislikes judicial activism because even when it is lawful it usually detracts, however slightly, from self-government. New believes that the Court has too often intruded on the proper spheres of elected legislators. He believes that ideally local legislatures, close to local problems and answerable to local people, should be left to devise their own remedies for educational dilemmas such as school funding.

As Justice New muses, however, it occurs to him that a liberal Justice would probably feel fewer compunctions about compromising federalism and democracy, provided that judicial intervention served liberal political ends such as abortion rights, procedural rights for criminal defendants, and so forth.

In such cases, liberals typically invoke one of two arguments. The more activist liberals urge the Court to enforce the evolv-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ing "fundamental values" of America, regardless of whether those values are stated in the text of the Constitution. The goal is to keep the Constitution in tune with "the changing aspirations and needs of the people." Unfortunately for this theory, opinion polls reveal that the values of average Americans differ from those of professorial and judicial elites. On most cultural questions, ordinary folk are more conservative. According to the polls, most Americans favor school prayer, oppose affirmative action, and are prepared to crack down on dissidents and criminals without much regard for legal niceties. Those who advocate "adapting the Constitution to the evolving needs and values of our times" don't have *these* fundamental values in mind. Liberal scholars never say that the horrendous new problems of drugs and inner-city crime justify reinterpreting the Fourth and Fifth Amendments so as to narrow their scope, nor do they argue that the failures of our public schools justify a constitutional right to a school voucher system. As Professor John Hart Ely has observed, "the fundamental values of the American people," as that phrase is used by constitutional jurisprudents, is a euphemism for the fundamental values of the *New York Review of Books*.

Liberals also justify activism on the ground that it rectifies prejudices against "out groups" that are inadequately represented in the political process. Like other theories of judicial review, this is a highly manipulable concept, usually invoked to justify decisions that are also desired on ordinary political grounds. When we ask whether some class of citizens is unduly disadvantaged in the political arena, it is almost impossible to avoid smuggling normative, political judgments into this ostensibly factual investigation. Not surprisingly, liberal Justices never find that conservatives such as the O'Briens (or Bakke) suffer from unfair political disadvantages.

## Balancing the interests

Justice New may well conclude that parents seeking good schooling for their children are as politically disadvantaged as "the liberal interest groups." Nevertheless, he may reasonably decide not to imitate liberal activism. The argument for restraint based on democratic values, unlike the argument based on the rule of law, does not presuppose a judicial consensus.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Democracy, like fiscal responsibility or prudence in foreign affairs, is valuable in any quantity. If it is desirable for educational issues to be fought out in the political arena, and our Justice can help to achieve that result by voting against the O'Briens, he should do so. *Pro tanto*, democracy will be served.

Unfortunately, the problem is not quite so simple. There are other considerations. Suppose that several conservative Justices who value judicial restraint on "democratic values" grounds are able to form a majority in many cases that come before the Court. They can block liberal activism, and they can also prevent the revival of conservative activism. So far, so good. But they also know that liberals will eventually regain control of the Court. What they must then decide is whether to practice restraint when they are a majority, even if they do not expect liberals to show similar restraint when their time comes.

What should they do? A crucial factor, of course, is just how unrestrained liberal Justices have been and are likely to be in the future. New may believe that liberal activist creations like the right of privacy, although grave errors, are somewhat aberrational. Liberal activism has not been as uniform and monolithic as polemicists often imply. Even the least principled, most activist Justice feels certain constraints. Just as liberals have exaggerated the conservatism of the Rehnquist Court, so conservatives have exaggerated the liberalism of the Warren Court. However true it may be that liberal activists have gone too far, it is also true that, for one reason or another, they have not created many of the rights that one might expect from a wholly unconstrained liberal Court: for example, constitutional rights to welfare, to "due care for the environment," and so forth.

## Law or politics?

Returning to the *O'Brien* case, let us assume that Justice New concludes that a decision in the O'Briens' favor would not require a degree of activism greater than that exercised by most liberal Justices. According to standard conservative jurisprudence, liberals' practices are relevant only as illustrations of bad judging. But in contexts that are at least arguably analogous, most conservatives would weigh the behavior of liberals in determining what course to follow. Consider three cases:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

• Senator Bright believes that it violates sound principles of federalism for Congress to provide the states with grants, for example highway construction funds, that are conditioned on compliance with federal rules concerning unrelated matters. But such conditions are now common. Should Senator Bright vote against a conditional grant bill today, even if he approves of the cause served by the conditions?

• A Supreme Court decision has liberalized standing rules, thus permitting the federal courts to resolve disputes that Writ, a conservative public interest lawyer, believes should be left to the politicians. When a case arises that would advance a conservative cause, but that can only be brought by taking advantage of the liberalized standing rules, should Writ decline to take the case? (Assume that this would not violate Writ's duty to any client.)

• Green, an ultra-liberal lawyer with impressive credentials, has been nominated to the Supreme Court by President Clinton. Knutsen, a conservative senator, must decide how to vote. Knutsen believes that ideally nominees should be evaluated solely on the basis of their credentials, without regard to the popularity of their constitutional positions, and without the oversimplifications of television "attack ads." He also believes, however, that liberals have rejected and will continue to reject that view of the process whenever they care strongly about the result.

Knutsen believes that Green would be an extraordinarily bad Justice, though not for reasons that have sufficient mass appeal to carry the day. Knutsen is aware, however, that from time to time Green has taken unpopular stands that make him vulnerable to an all-out political attack of the sort that liberals mounted against Judge Robert Bork. Should Knutsen decline to participate in this sort of political maneuvering to defeat the nomination?

I believe that in all three of these situations most conservatives would give decisive weight to the behavior of liberals.

Can these situations be distinguished from *O'Brien*? The most obvious distinction is that *O'Brien* arises in a judicial context,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

where we do not ordinarily think it appropriate to speak of how "political opponents" behave, much less to imitate their "mistakes." We think of judges as umpires, not players. But this legal mode of thought assumes a degree of professional consensus that is lacking in constitutional law.

In other branches of law, a "mistaken" decision is commonly perceived as a lapse that will eventually be overruled, or at least rejected by most other courts. But constitutional law, as perceived by most conservatives, does not conform to this paradigm: The major liberal-activist decisions have not been overruled even by a "conservative" Court; they more closely resemble sacrosanct entitlements like farm subsidies than mistaken common-law decisions. In this unique environment, political analogies are more apt than legal ones.

## Converting liberals

Conceivably, liberal opinion will eventually veer back to the restraintist views that were popular early in this century. But what might generate such a reversal? This subject is never discussed; yet unless liberals are somehow converted, the long-term effect of conservative restraint is not to make "the Court" restrained, but only to create lulls between eras of liberal activism.

One possibility, of course, is that conservative Justices will win converts by their example of restraint. But this hope is wildly unrealistic. When conservative restraint serves conservative political causes, liberals quite reasonably perceive it as political conservatism, not principled judging. When conservative restraint does not serve conservative political causes, as in the field of property rights, liberals regard this not as a fair exchange for liberal restraint in sociocultural fields, but as an entirely different matter. The great majority of liberals believe that the case for activism is strong on the merits in fields where activism produces results liberals favor. They believe, with equal passion, that the case for activism is weak in fields where it would serve conservative ends. The fact that conservatives agree with them on activism in property rights is certainly not going to lead liberals to change their views on activism in other spheres.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The paradox of judicial restraint is that, insofar as it can be inculcated at all, it can only be inculcated by judicial activism. It was conservative activism, prior to 1937, that bred moderately restraintist liberal Justices like Frankfurter and Black. And it was the liberal activists of the Warren and Burger Court eras who transformed judicial restraint into the tenet of conservative orthodoxy it is today.

Conservatives complain constantly about the self-serving apologies for judicial activism that flow out of the liberal law schools. In a sense, I wholeheartedly agree. But on another level such criticisms are naive: If for fifty years the French had been the only people who were willing to go to war, then *of course* the Sorbonne's faculty would take a relatively expansive view of the circumstances in which war is morally legitimate.

Superficially the Supreme Court, like the presidency, alternates between liberal and conservative eras, giving both factions' theoreticians an incentive to fashion a politically neutral constitutional jurisprudence. In practice, however, the major prerogative of the Court—rights-creation—has been exercised almost exclusively by liberals for over half a century. Even today the "conservative" Court creates very few conservative rights. Absent a credible threat of broad-scale conservative activism, judicial restraint is contrary to the substantive political interests of liberals, and will remain, in their view, misguided.

The liberal restraintists of the New Deal generation are now a dying breed. Today, even the most moderate of liberal constitutional scholars are activists, at least by conservative standards, as is the current generation of liberal law students—the pool from which Democratic Justices will be drawn thirty years hence. The central strategic fact is that, in the long run, conservatives lack the power to determine whether "the Court" is restrained. They have only the power to determine whether *they* are restrained. Mainstream conservative jurisprudence, which ignores this reality, is utopian.

The dilemma of conservative jurisprudence, then, is that we must sacrifice either our commitment to judicial restraint or our right to equal power on the Supreme Court. If, with his eyes open, Justice New chooses to sacrifice equal power, I can-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

not confidently assert that he is mistaken. But he should not do so under the illusion that he has no ethical alternative. He does.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# A new plan for the family

RICHARD T. GILL & T. GRANDON GILL

IN 1991, the much-publicized Rockefeller Report† declared that "the family is and should remain society's primary institution for bringing children into the world and for supporting their growth and development throughout childhood."

Nearly everyone agrees. Unfortunately, the American family is not fulfilling this objective. It is not doing so "throughout childhood," and it is not even doing so for infants and toddlers.

If we look at intact families with children under age six, we find that in the majority of these families both parents are working. Fathers almost always work full-time, and two-thirds of working mothers do, too. Care of their children is left to others.

These are intact families. But fathers are fleeing the home in increasing numbers. Despite much talk of the new caring, nur-

†*Beyond Rhetoric: A New American Agenda for Children and Families* (Final Report of the National Commission on Children: U.S. Government Printing Office, 1991).



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

turing father, the central fact in recent years is the growing absence of the father, whether because of illegitimacy, divorce, or desertion. In 1988, over one-third of children under eighteen were living without the presence of the biological father. By 1990, nearly 10 percent of American children (6.2 million) were living without *either* parent.

Adding the final touch to the picture, there are important pressures to adopt public policies that would further reduce the role of the family as the "primary institution" for raising young children. Federal legislation passed in 1990 encourages out-of-home day care. And the family-leave legislation passed earlier this year, though admirable in its intent to foster in-home care for newborns, also serves as an incentive for parents to return to their jobs within a few weeks of childbirth.

Is this, then, the end of the matter? The end of the historic link between families and young children? Is "the problem," as Isabel Sawhill put it in a recent Brookings Institution report, simply "that no one knows how to fix the family"?

In this article, we consider one important step that might be taken to strengthen families with young children. We call it a Parental Bill of Rights.

## Older men and younger mothers

In recent decades, American society has created a dramatically new life sequence for the average citizen. This new life sequence is the result of two major changes: (1) the increasingly early and lengthy retirement of older men, and (2) the increasingly active labor force participation of women.

In the case of older men, official estimates are that labor force participation for males over age sixty-four has plummeted from 68 percent in 1890 to 17 percent in 1988. Actually, the change is even more dramatic. Recent research suggests virtually all of the decline in labor force participation has taken place since the 1940s.

Men between fifty-five and sixty-four are also working less. In 1948, 90 percent were working; forty years later, only 67 percent are. Considering that life expectancy rose sharply during the same period, these changes in work patterns can only be described as revolutionary.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The question of why men are leaving the labor force so early is the subject of a vast literature. But the most important reason is clear: Men are retiring earlier because they can afford to. They can afford to because we are a much richer society than we used to be. But they can also afford to retire earlier because of Social Security, Medicare, Medicaid, disability insurance, public pensions, and tax-deferred private pensions. Through these programs and others, the U.S. government makes very large payments to elderly citizens. These payments appear particularly large when compared with government payments to young adults and children.

The second key demographic fact is the striking increase in the number of women working, in particular women with young children. If older men often quit work because they can afford to, these young women often work because they can't afford not to.

Betty Friedan once said that women are rushing into the labor force out of "sheer economic necessity," in order to "survive." This argument is buttressed by statistics that show income has grown more slowly for younger than older workers in recent years.

Even so, the concepts of "economic necessity" and "survival" clearly have to be reinterpreted somewhat if we are to take any kind of historical perspective on the matter. Barbara Bergmann, a forceful supporter of the cause of women in the work force, has noted that "a husband in the 1980s commands a salary that is (after accounting for inflation) perhaps four times as large as [that of] his counterpart at the turn of the century, whose wife did not 'need' to work. If today's family is so well provided for by the salary of the husband alone, in what sense does the family 'need' the wife's paycheck?"

Furthermore, where economic "necessity" would appear to be less—in intact, as opposed to single-parent families, and for educated, as opposed to uneducated women—labor force participation is higher. Of mothers with infants, 68 percent of those with four or more years of college are in the labor force, compared to 30 percent of those who have less than a high school education.

This is, of course, a reversal of the older pattern in which only mothers in very poor families would go out to make money. The great increase in the modern era is coming from women whose husbands are quite well off. Indeed, many analysts have

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

emphasized the lure of higher wages, rather than economic pressures, in explaining this dramatic change in women's labor force participation.

Still, we would defend the general notion that women in today's America work because they "can't afford not to." And they can't afford not to because: (a) there are some cases of genuine economic necessity; (b) "need," after a certain minimum of subsistence has been attained, is a very subjective matter and clearly applies to a much wider range of goods and services in a technologically advanced society than in earlier and more primitive times; (c) among these new and more available goods and services is, for the conscientious parent, an increasingly expensive college education for one's children; (d) no matter what one's husband is earning, there is always the possibility of divorce—obviously a very serious possibility today and one the wife will want to protect herself against by developing educational and work experience; and (e) there is the overwhelming fact that in a long life expectancy, low birth rate society, there really is no serious alternative to major lifelong working careers for most women. The career of full-time wife, mother, and homemaker has simply ceased to be an adequate life project.

This last point is in some ways the most vital of all. What it suggests is that a major cost of not working when one's children are very young is that one may thereby miss out on what *could* be an adequate life project—i.e., a full and satisfying career outside the home. If we are interested in programs designed to restore the family as the "primary institution" for raising our young children, we will have to confront squarely the obstacles that any interruption of already launched careers would present to young mothers and fathers.

## Working longer and later

We want to consider now the possibility of reversing developments to some degree, that is, of altering life sequences so that individuals would work longer into their life spans and would devote added years to bringing up their children at home. In short, later work years would be substituted for earlier ones.

We believe this shift is feasible, for several reasons:

First, we know that when we were a poorer society, not only a century or half-century but even thirty years ago, parents were

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

somehow able to bring up their young children without undue strain. If we calculate the "total dependency ratio"—the number of persons under twenty and over sixty-four, divided by the number of persons between twenty and sixty-four—we find that ratio was exceedingly high in 1960 (0.90) and, indeed, higher than it is today (0.70) and higher than it is projected to be in 2040 (0.81), when all the baby boomers are over 64. Yet somehow parents in the 1960s made a go of things.

Second, today's elderly are clearly capable of working longer. Most are in good health, and the nature of work today—mostly services rather than manual labor—is well-suited to their capabilities.

Third, the number of years out of the labor force that at-home parental child care would require is, in a low birth rate society, quite limited. If we assume that a parent would stay home until his or her children were beyond preschool, then for an average family with two children we are talking about seven or eight years from one parent's work life. Since some parents already provide at-home care for their young children, the loss of labor for society would be even less.

The loss of labor would be small for an additional reason: If parents do not take care of their preschool children, someone else must. Considering the cost and labor-intensity of quality child care, this is a major factor.

Fourth, and finally, the fact that retirement ages have so clearly been influenced by public policies such as Social Security suggests that other public policies could lead to later retirements.

It is sometimes forgotten that one of the major reasons for the introduction of the Social Security system during the Depression was to encourage older workers to retire, in order to make greater job opportunities available for younger workers. Policies can and do make a difference and can be adjusted as circumstances change.

## A Parental Bill of Rights

All this is by way of necessary background for the public policy proposal we shall sketch out in the next few pages. Ideally, a pro-family policy would meet the following minimum conditions:

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

1. It would not jeopardize the career prospects of a spouse who remained at home while the children were of preschool age.
2. It would be in the nature of an investment expenditure, ultimately repaying itself to society, rather than a consumption expenditure, which has no long-run dividends.
3. It would not encourage parents to have more and more children so that they could stay out of the labor force indefinitely as welfare dependents.
4. And, of course, it would encourage parents to provide primary care for their own children, at least for the first five years of life—the central point of the exercise.

We propose that the centerpiece of such a policy should be a Parental Bill of Rights, modeled on the G.I. Bill of Rights adopted near the end of World War II. The essential premise of a Parental Bill of Rights would be that parents who raise their own young children perform an extremely important social service. By doing so, however, they sacrifice both current income and long-run career prospects. In return for these socially desirable sacrifices, society will compensate them by subsidizing their further education so that they can more effectively reenter the labor force, or, if younger, enter the labor force for the first time. Such education, as under the original G.I. Bill, could be at the high school, vocational school, college, graduate, or even post-graduate level.

In the case of returning veterans, the essential logic was the same: These men and women had made notable sacrifices for a highly desirable social end. While in service, they had received very low wages and also had their educations and careers disrupted, in some cases for a period of several years. Society repaid these veterans by providing them with a subsidy that included tuition, books, and a subsistence income, so that they could complete an educational program that would help them succeed in civilian life.

And what a dividend society itself reaped! Under the G.I. Bill and successive acts, over 19 million Americans went on to higher education or to various forms of vocational, technical, or other career training. In a recent article in *Newsweek*, James Michener "judged the law one of the two or three finest Congress has ever

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

passed since our Constitution took effect." Peter Drucker, writing in *The Public Interest*, dated the beginning of the information age itself from the passage of the G.I. Bill. The William T. Grant Commission explains:

> By this one stroke of national policy, the nation's pool of trained talent was expanded manyfold and the postsecondary educational domain, once the preserve of an affluent elite, was democratized beyond that of any other country. Fueled, at least in part, by so many newly skilled hands and trained minds, the United States enjoyed the longest period of economic expansion and prosperity in our history.

Without any question, the G.I. Bill was one of the most successful programs the federal government ever launched.

How would such a program, adapted to the needs of parents of young children, meet the four general conditions that we outlined above?

First, it would enhance the career prospects of the spouse who stayed home to take care of the children. As we have seen, a major cost to the parent of such child care is the interruption to an already established career or the delay in launching a career. It is well known that these interruptions and delays are, in the present state of affairs, never fully made up later in the person's work experience. To combat this potential loss, the Parental Bill of Rights would make it possible for the parent to achieve an offsetting gain: a higher level of education and training than could otherwise be undertaken. This promise of further education and eased reentry into the labor force would also reduce the caregiver's need to accumulate market skills as a protection against divorce.

Second, the furthering of the parent's education would pay off later in higher productivity. Recent studies from the National Bureau of Economic Research, the Census Bureau, and many other sources document the very high returns to education in today's America, and also the shortage of highly skilled workers.

There would actually be two investment gains: (1) the increase in the parent's productivity, and (2) the benefit to the child of closer parental care during the early years of life.

Third, it is unlikely that a Parental Bill of Rights would lead parents to continue having children in order to accumulate more and more educational credits. In any event, this is a danger

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

easily guarded against. A limit could be imposed on the number of educational credits that could be collected. One could also design the program so that credits could be used only when there were no longer preschool-age children in the family. Parents would then have an incentive to finish their child-rearing years in a fairly compact way so that they could get on with their education and careers.

Finally, a Parental Bill of Rights would certainly move society in the direction of increased at-home parental care for infants, toddlers, and preschoolers. The size of the impact would of course depend on the specific design of the program—the size of tuition benefits, the size of allowances for living expenses, the number of years over which benefits could be spread, and so forth.

## Who would pay?

How would Parental Bill subsidies be financed? In a more comprehensive paper that is forthcoming[††], a model program is sketched out with specific financing suggestions. For the moment we stress the basic idea, which would be to induce a shift of labor force participation from young parents to older workers. Our analysis indicates that the required increase in labor force participation by older workers would not be large. Still, it is prudent to assume that some increase in the average age of retirement would be needed.

There are many public policy levers that could be pulled to achieve such an effect, the most obvious being to increase the age for Social Security eligibility. Since all evidence indicates that public subsidies in recent years have been disproportionately focused on older age groups, such a method of financing is clearly defensible.

Although there would be some transition problems, in the long run each generation would basically finance its own programs. As with public education, some of the costs would be sustained by households without children. It would also be desirable, however, for parents who directly benefit from the subsidies to pay some additional share of the costs, most likely

[††]Paper to be presented at the June 1993 conference on marriage of the Institute for American Values.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

through deferred eligibility for Social Security. These costs should be borne by both parents, even though in many cases only the mother will enjoy the educational benefits of the program.

How would a Parental Bill of Rights affect single women with children? By tilting incentives toward at-home parental care, the program would unquestionably militate against various workfare and child-care subsidy schemes that might be introduced to address the problems these single mothers face. The difficulty is particularly acute when, as is often the case, these women are in poverty. Essentially, there are three public policy alternatives here: (1) encourage poor women on welfare to work and have others bring up their preschool children; (2) encourage them to bring up their own preschool children and then later get training and education so that they can become more productive members of the labor force; or (3) preserve strict neutrality between these options.

Each alternative has obvious arguments in its favor. Suffice it to say here that for those who believe the family should be the primary institution for raising children, the second alternative would be preferred. Encouraging education and training through a strong Parental Bill of Rights is, arguably, the best overall policy for helping single-parent welfare families. If actual experience showed otherwise, it would of course be possible to amend the plan. We might also try experimenting with two different approaches—day care and workfare vs. parental care and subsequent Parental Bill training. Flexibility is both possible and desirable.

## The challenge

Most public policies aimed at helping children have an unfortunate tendency to replace and hence undermine basic family institutions. Thus while solving superficial problems, they only intensify the underlying problem.

But this need not be. With a Parental Bill of Rights, we can simultaneously strengthen the position of young parents, their children, and the economic and overall well-being of society. A properly conceived Parental Bill would do all these things. Indeed, the real question is not whether stronger families can be achieved, but the seriousness of our commitment to achieving them.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# The end of welfare as we know it?

DOUGLAS J. BESHAROV with AMY A. FOWLER

ONE OF THE loudest—and most bipartisan—rounds of applause during Bill Clinton's 1993 State of the Union address came when he reiterated his promise to "end welfare as we know it." During the campaign, Clinton repeatedly said that welfare benefits should be time-limited, and that, after two years of job training and education, welfare recipients who can work should be required to do so. "We have to end welfare as a way of life," he told Congress and the nation, "and make it a path to independence and dignity."

Clinton's rhetoric taps into a deeply held feeling among the public and politicians that long-term welfare dependency is a serious and growing social problem. And it is. We often hear that about half of all new recipients are off the rolls within two years. This is true—but only because of the high turnover among short-term recipients. At any one time, about 82 percent of all recipients are in the midst of spells that will last five years or more. And about 65 percent are caught up in spells of eight years or more.



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This reality propelled a decade of progressively more intense efforts to reduce welfare dependency. First came the state welfare-to-work demonstration projects of the early 1980s, then the Family Support Act in 1988, and, most recently, the state-initiated welfare reforms of 1991-92.

Clinton's campaign promise could be the next step in this evolutionary process. But the details of his proposal have never been spelled out. Any number of missteps—caused by misjudgment or political compromise—could cripple the program or, worse, could lead to even higher levels of welfare dependency.

## Welfare then and now

Until the mid-1960s, welfare agencies tried to regulate the conduct (some called it the morals) of their clients. The man-in-the-house rule, along with the infamous midnight bed checks to enforce it, were only the best known of an array of policies designed to keep welfare mothers on the straight and narrow.

Then came a period of reaction against this paternalism. The poor, we were told, "are just like everyone else. All they lack is money." This attitude reached its high-water mark with talk about a negative income tax and the Nixon administration's proposed Family Assistance Plan.

By the 1980s, however, the political and intellectual consensus had turned again. Rising anxiety about the dependent and self-destructive behavior of the poor—be it school drop-out rates, teen pregnancy, nonwork, or drug addiction—gave liberals as well as conservatives a gnawing feeling that more decisive efforts to reshape the behavior of welfare recipients were needed.

It was in this context that Senator Daniel Patrick Moynihan introduced the Family Support Act. The Act, passed by a Democratic Congress and signed by Ronald Reagan, was the first major overhaul of the Aid to Families with Dependent Children program (AFDC) since its inception in 1935. It seeks to move welfare recipients into jobs—first, by making the receipt of benefits contingent on participation in education and employment programs; and second, by providing transitional health benefits and child care to those returning to work. Hence, its name: "JOBS," for Job Opportunities and Basic Skills Training Program.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Although mandatory education, job training, and work programs are at the heart of the Act, the obligations it places on recipients are actually quite modest. Liberals in Congress intensely opposed any work or training mandates, so a compromise was struck that requires participation by just 7 percent of mothers who receive AFDC (often for just twenty hours a week). By 1995, mandated participation will rise to a cap of 20 percent. Exempt from even these minimal requirements are large groups, such as mothers with children under age three (or age one, at state option).

Unfortunately, since the passage of the Family Support Act, AFDC rolls have risen, not fallen. AFDC rolls are higher than at any other time in our history. In August 1992, almost 13 million people were on welfare. That includes one in seven American children. Most startling, in just over three years (from July 1989 to August 1992), welfare caseloads rose by 27 percent.

The usual explanation given for this increase is the economy's weakness since the passage of the Act. While the impact of the economy is undeniable, the fact is that the upward trend in welfare cases began before the recent economic downturn and gives every indication of continuing afterward. Careful research by a number of analysts indicates that much of the increase in AFDC caseloads has been caused by the growth in out-of-wedlock births among young, disadvantaged women. Thomas Gabe of the Congressional Research Service, for example, found that the rise in unwed mothers accounted for over 70 percent of the additional welfare families that appeared between 1987 and 1991.[1]

This should come as no surprise. About half of unwed teen mothers go on welfare within one year of the birth of their first child. More than three quarters end up on welfare within five years.

Long-term welfare dependency is worsening because, for thirty years, out-of-wedlock birth rates have been steadily increasing. Between 1960 and 1989, the number of children born out of wedlock tripled. One in four American children is now born out of wedlock.

---

[1]Gabe used a database that reflected half of the total increase in AFDC cases.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

## The states react

Toward the end of 1991, into this mixture of rising out-of-wedlock births and concomitantly rising welfare caseloads, came mounting budget deficits caused by the recessionary economy. In state after state, governors started desperately looking for places to reduce spending. It was only a matter of time before the budget cutters turned to welfare programs.

As one looks back, the situation was like tinder waiting to be lit. Three governors provided the spark: one the moderate, Democratic governor of Maryland (close to the nation's capital, so that his plans were widely noted by those working for the national media); another the conservative, Republican governor of California (the nation's largest state); and the third the liberal, Democratic governor of New Jersey (located near the media center of New York).

In November of 1991, Maryland Governor Donald Schaefer—facing a daunting budget deficit—proposed an across-the-board 30 percent reduction of welfare payments that would not be restored unless parents proved that they had paid their rent, kept their children in school, and obtained preventive health care for them.[2]

Two weeks later, Governor Pete Wilson of California proposed that AFDC payments no longer be increased with the birth of additional children. He also proposed that grants to teenage mothers be given only if the teenager were living with her parent or legal guardian, with the grant going directly to the adult. Another provision of Governor Wilson's plan, known as "Cal Learn," would have awarded teenage parents a $50 increase in their monthly AFDC grant if they attended high school and, conversely, a $50 reduction if they dropped out.[3]

Wilson's proposals also included significant reductions in basic welfare funding: Grant levels were to be reduced 10 percent for all recipients, with an additional 15 percent reduc-

[2]As enacted, this became a monthly sanction of $25 for recipients whose children are not vaccinated or in school, and small financial bonuses for families that receive annual check-ups ($20 per person in the family) and for pregnant women who receive prenatal care ($14).

[3]Similar "Learnfare" programs had been in operation in Wisconsin since 1988 and in Ohio since 1989, but neither was widely known to the general public or the national media.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion after six months for families headed by an able-bodied adult.[4]

Within weeks of Wilson's proposal, Wayne Bryant, the outgoing Speaker of the New Jersey State Assembly, proposed his own welfare reform plan. Bryant's plan gained the media spotlight in part because he is a black man whose district includes Camden, the state's poorest area; half its residents are on welfare. After some initial hesitation, Governor James Florio became a strong backer. The final plan, as enacted in January 1992, eliminates the increase in a mother's AFDC grant following the birth of an additional child.

In addition, New Jersey's plan seeks to promote employment by allowing welfare families to earn as much as a quarter of their monthly grant (depending on family size) and still receive full benefits. It also abolished the "100 hour rule," which terminates the benefits of recipients in two-parent households if the parents work over 100 hours per month. Finally, the plan contains a "Wedfare" component, which in some cases allows a woman to retain a portion of her welfare grant after marriage.

To the surprise of many, these proposals (sometimes called the "New Paternalism") received largely favorable reviews in the press, despite the hardships they might inflict on recipients whose behavior did not change. Even the *New York Times*, for example, called the New Jersey proposals, including the cap on benefits for additional children, "a compassionate, realistic blueprint for dealing with an intractable problem."

Once it became clear that these three governors could propose drastic changes in welfare programs without being labeled anti-poor, racist, or worse, politicians in other states followed. Within months, governors and legislators in more than half the states had introduced similar legislation. The proverbial cat was out of the bag.

Some observers have attributed this spate of "get tough" welfare proposals to simple budget cutting. Clearly this motivated some of the states. But focusing only on possible budgetary savings underestimates the scope of support for these proposals,

[4]Wilson proposed his plan as part of a larger referendum on state spending, which was defeated this fall. In its place, the legislature passed a weaker law to reduce AFDC grant levels by 6 percent and create work incentives for AFDC-UP ("unemployed parent") recipients.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

which is rooted in the public's worries about welfare dependency and its desire that something be done about it. In fact, many of these proposals were estimated to cost more money, at least in the short-term. This was certainly true for plans to encourage work or marriage by increasing earned-income allowances and loosening the "100 hour rule."

Unlike past efforts to reform welfare, this one was not led by Washington. Instead, in what comes close to being a spontaneous, grass-roots movement, governors and other state and local officials were the key movers. Liberals and conservatives alike supported these proposals, attesting to their widespread appeal.

As president, George Bush offered support to these state proposals, but he did not put forward major initiatives of his own. While there were good reasons to be wary—some of the ideas being heralded as the answer to welfare dependency had been tried before and had failed—Bush missed the political drumbeat. Candidate Clinton did not.

## The Clinton plan

Throughout his campaign, Bill Clinton vowed to "end welfare as we know it." In an oft-repeated formulation, he promised to "provide people with the education, training, job placement assistance, and child care they need for two years—so that they can break the cycle of dependency. After two years, those who can work will be required to go to work, either in the private sector or in meaningful community-service jobs."

As proposed thus far, Clinton's plan would take the essential elements of the Family Support Act and give them a stronger bite. The Act does not force participants to work, simply requiring what is often a short stint in job training or other activities. Clinton, on the other hand, wants recipients to receive a full two years of training and education, which could include college classes. At the end of these two years, Clinton would require recipients to work or leave welfare, whereas now they can receive benefits indefinitely. Finally, all welfare recipients would be subject to the new rules, as opposed to only 20 percent under current law.

Clinton has succeeded in refocusing national attention on the problem of long-term welfare dependency. Like the state welfare reform proposals, his plan appeals to a large swath of

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the public. But it will be expensive; the Clinton campaign estimated that new welfare expenditures will total $7 billion a year by 1996. Moreover, there is no assurance that the plan will work. Here are some of the pitfalls Clinton faces:

***A new welfare trap?*** Improving the skills of welfare mothers is essential. Without more to offer employers, many mothers will never be able to earn enough to support themselves and their families. This is a major reason why they are on welfare in the first place.

Unpublished documents from Clinton's campaign estimate that the expanded job training he proposes will reduce welfare caseloads by 14 percent over four years. This modest claim seems reasonable—if the two-year rule does not become an entitlement to two years of training and education.

But that is a big *if*. Clinton has promised to give welfare recipients up to two years of education, job training, job placement assistance, child care, and additional health coverage. Will this promise act as a magnet, attracting more people to welfare and keeping them on longer—so that they can get the benefits? There is some evidence that this happened in California before budget problems forced the state to trim the educational benefits in its welfare-to-work program.

Advocates of the two-year time limit say that it will reduce welfare dependency. However, maximums have a distressing tendency to become minimums. If the hundreds of thousands of new recipients who now quickly leave the rolls lengthen their spells to take advantage of a new training entitlement, caseloads will explode.

And why two years? Presumably because of the often-stated datum that half of all new recipients are off welfare within two years (see above). But there is no magic line at two years. It is just a convenient measure of dependency. Many recipients go off after much shorter periods.

One hopes, therefore, that the two-year time limit will not be applied literally but, instead, will be used to signal a new, overarching commitment to discouraging long-term dependency.

***Can training do it?*** Those recipients who are already motivated to improve their lives, such as most divorced mothers,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

will probably do well under Clinton's plan, especially if they are allowed to attend college or community college while receiving benefits. But, to make a real dent in welfare dependency, the training will also have to help unwed mothers, who form the bulk of long-term welfare recipients.

That will not be easy. Years of inactivity leave their mark. These young mothers, who start with poor prospects, further limit their life chances by dropping out of school, by having babies out of wedlock, and by not working. As a result, they do not have the education, skills, or work habits needed to earn a satisfactory living.

For many young mothers, training—at least as we now provide it—is too little, too late. Even richly-funded demonstration programs find it exceedingly difficult to improve the ability of these women to care for their children, let alone to become economically self-sufficient. Earnings improvements in the realm of 6 percent are considered successes for poorly educated young mothers with sporadic work histories. (Most programs don't even try to work with fathers.)

California's welfare-to-work program is a case in point. In 1985, the state established the Greater Avenues for Independence (GAIN) Program, an education and training project for women. A six-county evaluation found that, for single parents, average yearly earnings increased by only $271. The county with the greatest improvement, Riverside, was able to increase earnings by about $1,000, but average total earnings in Riverside were still less than $2,500—not nearly enough to lift these single mothers off welfare. The welfare rolls declined by only 7 percent in Riverside, and by a disappointing 3 percent in the other counties.

***Make-work jobs?*** After two years of education and job-training, most unwed mothers will still not be able to support themselves. Subjecting them to a work requirement will mean that a large proportion will end up in semi-permanent "community-service jobs," a euphemism for having them work to earn their welfare benefits (usually at the minimum wage).

The Clinton campaign estimated that under its reform plan, about 1.5 million young mothers would be required to take such jobs. Such a "workfare" program might, by itself, lower

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

caseloads. One of the few systematic evaluations of workfare took place in Ohio. Welfare recipients in eight counties were subject to a twelve-hour-per-week work requirement. For those in the welfare program for two-parent households, AFDC-UP, at least one adult was required to work up to forty hours. After five years, AFDC caseloads were 11 percent lower than would have been expected based on the experience of other counties in the state. AFDC-UP caseloads were a third lower.

A work requirement might also reduce the attractiveness of welfare for young people with poor earnings prospects. If young people know that the welfare agency is serious about mandating work, they will be less likely to view AFDC dependency as a possible life option. Over the long run, this could change behavior substantially—as the implications of the new regime sink into the consciousness of disadvantaged teens.

At least in the short run, however, a workfare program would be much more expensive than the current system, because of added costs for administration (to establish and monitor job placements) and child care (to free mothers to work). Clinton staffers estimate that monitoring each job would cost $2,100 annually; child care would add $1,300. The additional cost of $3,400 per family is about equal to the average AFDC grant.

The biggest question, of course, is whether these would be real jobs, or simply the make-work jobs of the past. The Ohio program operated in only eight counties and was forcefully administered at the state and local levels. Conducting such a program on a nationwide scale will be much more difficult. Applying workfare to just half the welfare caseload could require a program at least five times the size of the present JOBS program, which the states have had great difficulty administering.

If the Clinton administration does succeed in introducing a national workfare program, it will take extreme shrewdness—and good luck—to avoid a replay of the results of CETA, the Comprehensive Employment and Training Act. Between 1973 and 1984, CETA spent $60 billion dollars, and was widely perceived to be a failure. Lawrence Mead of New York University summarizes: "CETA was troubled by scandals. Local governments often used the slots for political patronage or to rehire displaced public employees, rather than give people with more

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

serious work problems a chance. [It] also had little impact on the intended clients, and this was more damaging in the long run."

***The "slavefare" label?*** Key members of the welfare policy establishment have never liked the idea of requiring the poor to work at low-paying jobs to qualify for welfare benefits. To discredit earlier efforts to impose work requirements, they labeled them "slavefare."

This argument strikes a responsive chord among Americans who feel partially responsible for the situation facing these mothers and ambivalent about imposing "further hardship" and "our values" on them. But if not our values, whose? Certainly not those of a teenager who, by having had a child she cannot support, has already demonstrated that she does not make the wisest of decisions.

Strong opposition to the workfare component of Clinton's plan has already surfaced among his liberal constituencies. Given Clinton's very visible commitment to the idea, he is unlikely to abandon it, but he could well bend to pressure and emasculate the work requirement by adding various qualifications and exemptions.

***The temptation to exempt?*** The opening would be Clinton's phrase "those who *can* work will be required to go to work" (emphasis added). As David Ellwood, assistant secretary-designate at the Department of Health and Human Services, has written: "it would not be difficult to create a set of exemptions that led to just 10 percent of the caseload being required to work." The possible exemptions? Mothers with children under three, mothers still in high school (or any school, for that matter), those with psychological problems or drug and alcohol addictions, and even those who are "socially" or "employment" disabled.

This would be a mistake. Mandated community service may be the only way to build the job skills and work habits of those who cannot support themselves in the regular job market. Inactivity is bad for everyone; it can be devastating for those only loosely connected to the labor market. Child abuse, drug abuse, and a host of social problems are associated with

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

long-term welfare dependency. A work requirement will help to reduce their levels.

Nevertheless, the problems of some young mothers will prevent them from satisfying even the minimal obligations of a part-time community service job. That's why Judith Gueron, president of the Manpower Demonstration and Research Corporation, the prime evaluator of much of the last decade's welfare reform programs, warned in the *New York Times* last year:

> I think that if we introduce time limits on welfare, we'll have more women and children living in Grand Central Station.... There are a great many welfare recipients who are very marginal in terms of their ability to work. Some are clinically depressed, or were abused as young women. This is not a group that just needs a good kick to get their act together.

But continued idleness would be an unwise accommodation. Their lives desperately need the structure that only the larger society can provide. These young mothers may need a modern version of the nineteenth-century settlement house, where counseling, education, child-development and parenting services, and other activities to structure otherwise idle time are all provided under one roof. The base for such a program could be the expanded Head Start program that everyone seems to support. Head Start professionals call this approach "two-generational programming."

***Will we sanction?*** Most welfare recipients will not participate in these programs willingly, and many will drop out. Hence society, through welfare agencies, must be prepared to monitor compliance with work requirements and to sanction noncompliance.

But this is not simple. When Candidate Clinton spoke of cutting off benefits to mothers who fail to meet work and training requirements, most voters probably assumed that he meant to cut off *all* payments to them. But Clinton has been consistent in saying that it is only the mother's portion of the AFDC grant, and not the children's, that will be cut. Food stamps, Medicaid, housing, and other benefits would remain untouched.

Clinton may be overestimating the power of such a narrowly delimited sanction. In fact, we already have some idea

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of how such a sanction might affect the behavior of young mothers. Between 1987 and 1991, the Department of Health and Human Services operated the Teenage Parent Demonstrations in Camden and Newark, New Jersey, and in Chicago, Illinois. These projects required that all teen mothers participate. If they failed to do so, they were subject to a reduction of their welfare grant by the amount allocated to the mother, generally a third to a half of the family's grant, or about $160 per month.

The projects required participation in education, job-training, and work-placement programs. No exceptions were made for mothers with very young children or mothers still in school.

The first step was registration for the program, which included a preliminary session during which the mothers took a basic skills test and met program staff. There were high rates of compliance without the imposition of sanctions because the threat was real and readily apparent to the mothers. Over 30 percent of the teen mothers came in after receiving notice of the program, and another 52 percent came after they were warned of a possible reduction in their grant. Six percent had to be penalized before they would come in, and the remaining 12 percent never came at all.

After the initial assessment, the teen mothers were required to participate in workshops, public school classes, and education and training programs—activities that would presumably be included in the first two years of the Clinton plan. At this point, participation fell off sharply, dropping to about half. Even this low level of attendance was obtained only by heavy sanctioning. Sixty-two percent of participants who remained received formal warnings, while 36 percent had their grants reduced for at least one month.

Why this seeming lack of concern about receiving a full welfare grant? Some think it is because these women are unable to follow through with activities in their own economic interest. This is partly true, but there are also other forces at work. A study of welfare recipients by Kathryn Edin and Christopher Jencks found that AFDC and Food Stamps accounted for only 57 percent of their income. The rest came from friends, relatives, and absent fathers (21 percent), unreported work (10 per-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

cent), Supplemental Security Income and foster care (6 percent), illegal activities (3 percent), and other (3 percent). The evaluators of the Teenage Demonstrations believe that the mothers in their programs also had additional sources of support. It may be that some young mothers have decided that they do not really need the money, or that it costs too much in forgone income to attend the programs.

There is another possibility, which is more disturbing: The young mothers came into the programs, willing to try them out, but did not like what they saw. That would help explain the difference between rates of initial and subsequent participation.

In any event, the Teenage Parent Demonstrations give us an indication of what it might take to enforce compliance with Clinton's plan. Most young mothers will come in during the initial stages for an assessment, but they are unlikely to continue participating without real prodding. And, despite multiple warnings, almost 40 percent will suffer at least one reduction in their grants. From 10 to 20 percent will simply drop out—acquiescing in a semi-permanent reduction in their grants rather than participating.

Will we, as a nation, be willing to accept the trade-off of some possible harm to the children whose parents do not participate in return for the benefit to those whose parents do? And will the program really benefit those who participate?

These are tough questions, but they do not mean that we should retreat from Clinton's proposal. They do mean, however, that caution is in order. The history of social engineering is strewn with examples of perverse and unintended consequences from even the most promising of programs. As all sides in the welfare-reform debate have come to agree, we need carefully controlled experiments to determine the effects of new policies.

Before closing, we should give incrementalism its due. When the Family Support Act was passed in 1988, many were disappointed that it did not impose greater obligations on welfare recipients. No one who participated in that debate would have predicted that four short years later a Democratic president

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and a Democratic Congress would be poised to adopt a time-limited welfare system coupled with a universal work requirement.

We can now see that the Act codified a fundamental shift in public and professional attitudes. It legitimized discussions of behavioral poverty and of government's right (and obligation) to do something about it. By doing so, the Act opened the door to a second, much more ambitious wave of reform. Unless Clinton really fumbles, this is a tale to give incrementalism a good name.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# Are smokers rational?

NICHOLAS EBERSTADT

SINCE CLASSICAL TIMES, economics has asked how human desires can be met in the face of material constraints. Indeed, the discipline has been extraordinarily successful in measuring and analyzing this process. But when it comes to explaining the human desires that drive this process, economists have had rather less to say. Usually, they duck the difficulties, and simply accept tastes and preferences as fixed, "exogenous" quantities.

Clearly this increases the elegance and "computability" of economic models. Yet, just as clearly, it detracts from the effort to take an accurate measure of man. For only by recognizing the desires propelling economic activity can economics promise genuine practical and moral insights.

The lure of excitement, for example, is one of the primal urges that affects the resource allocation of individuals and nations, yet the economics of excitement is seldom formally considered. A few years ago, Tibor Scitovsky, the eminent emigré economist, trained his eye upon what he called "the desire for excitement in modern society." His argument was simple but far-reaching. "Excitement," he wrote, "is a primitive emotion, whose enjoyment seems to be an unchanging part of human nature." But while the demand for excitement is strong and enduring, its supply has been radically transformed by modernity. "Social, economic, and scientific progress in modern society," he argued, "have greatly reduced our main sources of excitement"—namely, "the hazards of everyday life, the dangers of the workplace, and the insecurity of one's livelihood." Whither then the quest for excitement among "those who enjoy boringly high standards of safety and security"? Some directions, like hobbies and sports, are unobjectionable and wholesome. Others may be more sinis-



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ter, for in Scitovsky's estimate this same search for excitement is implicated in our rising rate of crime, especially violent crime. Scitovsky observes:

> Considering that the chances of getting away with it unpunished are very much greater and have increased very much faster in the case of non-violent than violent crime, the faster incidence in the increase of violent crime is very perplexing and hard to explain, except on the ground that the combined thrill of violence and breaking the law is greater than [that] of the latter alone.

In our secure and affluent society, cigarette smoking may or may not be viewed as a possible source of excitement, but it is incontestably a source of risk and danger. In 1985, more than 300,000 Americans died from smoking. That is over fifteen times the number who died from murder. And, unlike homicide, the toll from smoking is self-inflicted. (It is true that smoking can expose non-smokers to various deadly hazards, but researchers believe that the risk from smoking falls overwhelmingly on smokers themselves.)

Statistical analyses suggest that smokers die two to four years sooner than non-smokers. Smoking is also believed to cause more premature deaths than murder, suicide, auto accidents, and all other sources of injury combined. Yet despite this hazard about a quarter of adult Americans are smokers.

Over the past two decades, economists have attempted to calculate the costs that America's smoking habits impose upon consumers, producers, and the state. But they have shied away from a matter of no less importance: an analysis of the motivations and behavior of the smoking populace. This may be due in part to the ostensible dissonance between received economic doctrine and actual observation. It is a basic dictum of modern economic theory that all economic agents, including consumers, act to improve their "utility" or self-assessed well-being. In the case of smoking, however, American consumers spend large sums of money (over $40 billion in 1990 alone) to engage in an activity that is quite likely to harm them. Moreover, while the fraction of the public that smokes has gradually declined over the past generation, adults who do smoke apparently smoke as much as ever—on average, over 10,000 cigarettes a year.

In their silence over this apparent paradox, economists have ceded discussion to a public health community with its own explanations. From the public health viewpoint, smoking is a behavior so obviously unwise that smokers must either be incognizant of its risks or powerless to desist. The premise underlying

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

this view is that individuals cannot be counted on to make decisions in their own best interest, and thus that improvements in their well-being must come instead from the regulation of their activity by supervisory authorities.

THESE COMMON PRESUMPTIONS of the public health community have just been thoroughly challenged by a slim and provocative book. In *Smoking: Making the Risky Decision*,† W. Kip Viscusi explores the behavior of the American smoker with the aid of economic reasoning. This original and penetrating study offers the reader a wealth of fascinating results by focusing upon a most unpredictable quality: the individual's response to risk.

Viscusi arrives well-prepared for his inquiry. A young professor of economics now at Duke University, he has, over the past decade and a half, published dozens of papers on the economics of physical safety. He has written or co-authored books on such topics as injury in the workplace, consumer product safety, and the economics of product liability. He is, furthermore, the editor of the *Journal of Risk and Uncertainty*, which was established specifically to encourage "analysis of risk-bearing behavior and decisionmaking under uncertainty."

For Viscusi, the question is this: Do smokers efficiently process information on the dangers of smoking? He sketches out three alternative "models" of smoking behavior in the search for an answer: "the rational smoker," "the stylized smoker," and "the smoker with cognitive limitations."

The "rational smoker" is none other than that elusive character, *homo oeconomicus*: He engages in a "rational learning process," "balances [the] utility value of smoking with expected utility loss," and selects the "efficient risk level." The "stylized smoker," by contrast, is an active agent in the service of market failure. He gives "excessive attention to exhortatory smoking advertising"; his "myopic behavior neglects future consequences" and he ultimately opts for a level of risk that is "too high compared with [the] idealized efficient market." The "smoker with cognitive limitations" is arguably the most engaging of the three. He is rational, to the best of his ability, in his decisionmaking, yet he labors under distinct disadvantages. His access to information is imperfect, and thus he underestimates "hidden risks." He also overreacts to "new and highly publicized risks" and to "risks that cause fear or dread." As Viscusi points

†Oxford University Press. 184 pp. $24.95.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

out, these biases—unlike those of the "stylized smoker"—do not all work in a single direction.

Having outlined the ways in which smokers might evaluate information about risk, Viscusi proceeds to review the availability of risk information. The sustained public health campaign against cigarette smoking began in 1964, with the first report to the Surgeon General on *Smoking and Health*. The report was followed by congressionally mandated health warnings on cigarette packs, the wording of which has become progressively more severe. The report also inaugurated an almost annual series of releases by the Surgeon General on the latest medical research about the health dangers of smoking.

THERE CAN BE little doubt that the first report to the Surgeon General was *the* signal event in promoting awareness of the health risks of smoking. But the risks were hardly unknown before then. Medical research in the 1950s had already highlighted the correlation between cigarette smoking and lung cancer; over the course of that decade, Viscusi notes, *Reader's Digest*—the most widely read magazine in America—ran no fewer than a dozen articles on the dangers of cigarettes.

As early as 1953, the Sloan-Kettering Institute issued a highly publicized report linking smoking to lung cancer. Over the years immediately following that report, U.S. cigarette sales plunged. But even before the Sloan-Kettering study Americans were hardly ignorant of smoking risks. According to a Gallup survey from 1949, for example, a majority of smokers at that time regarded smoking as "harmful." "Public concern with the health consequences of smoking," Viscusi observes, "did not begin with the on-product labels of cigarettes or with the official publications by the Surgeon General"; since that turning point, however, "smoking risks [have become] clearly among the most publicized risks in our society."

Those risks may be highly publicized nowadays, but how dangerous do Americans think smoking really is? To grapple with this issue, Viscusi produces a 1985 public opinion survey that questioned over 3,000 people about their views on the risks of smoking. One of the questions posed was, "Among 100 cigarette smokers, how many of them do you think will get lung cancer because they smoke?" The mean response was 43—a perception, in other words, that one stands a 43 percent chance of contracting lung cancer by smoking.

What is most interesting about this reaction is its relation to the medical profession's assessment of that risk. Research cited

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in the most recent reports to the Surgeon General, for example, suggests the lifetime lung cancer risk from smoking runs in the range of 5 to 10 percent. By this benchmark, the interviewees vastly *overestimated* the danger of succumbing to cancer from smoking.

Smokers, not surprisingly, felt that the risk of lung cancer was lower than did non-smokers. Yet even smokers guessed far too high. Their mean response was 37 percent, or over three times the upper bound of risk suggested by current research. Less than one smoker in six put the lung cancer risk from cigarette smoking at under 10 percent. In short, these survey results strongly suggest that most Americans *are* seriously misinformed about a key risk of smoking: They believe it to be much more dangerous than it is!

We may recall that Viscusi's "smoker with cognitive limitations" tends to overestimate the risk of events that fill him with fear or dread. Lung cancer is, in most people's ledgers, a particularly gruesome prospect. True to Viscusi's model, most people in the 1985 survey substantially overestimated the likelihood of lung cancer. Yet lung cancer is not the only, or even the most likely, way for smoking to kill. Heart disease and stroke are just two of the many less publicized risks. According to recent estimates, less than one third of deaths from smoking result from lung cancer.

DOES THE PUBLIC appreciate the overall level of risk associated with smoking? To address this question, Viscusi conducted his own, smaller survey in Durham, North Carolina, in 1991. On average, his sample judged the probability of dying from lung cancer due to smoking to be 38 percent—a perception roughly similar to that in the nationwide 1985 survey. As for the overall likelihood of dying from smoking, Viscusi's respondents guessed 54 percent. Current smokers in the sample put the risk at 47 percent. According to contemporary medical research, Viscusi notes, the "true" risk for lifelong smokers is between 18 and 36 percent. Once again, smokers themselves appear to have overestimated the actual risk of their dangerous pastime.

If Americans believe smoking to be so very dangerous, why do so many of them still do it? Viscusi examines, and rejects, a variety of explanations. Perhaps people are lured into smoking as teenagers, at a time (so the argument runs) when they do not understand the risks they are assuming. Viscusi notes, however, that teenagers and young adults regard smoking as far *more* dangerous than does the rest of the population. Another possibil-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ity is that smokers are exposed to many favorable messages about smoking (perhaps from advertising or their peers) and that such messages cloud their judgment about the risks. Viscusi's analysis of the 1985 survey, however, suggests that perceptions of lung cancer risk were not appreciably affected by statements (either positive or negative) that interviewees could recall hearing about smoking. Viscusi attributes this to the low informational content of additional information on smoking's risk in an environment already saturated with such information.

Finally, it may be that smokers wish to quit, but simply cannot. Viscusi's response to this proposition is more complex and nuanced, but no less skeptical. "The fact that many smokers profess a desire to quit smoking," he writes, "should not necessarily be treated as an index of market failure. Almost half the residents of Los Angeles indicate a desire to move out of the city, but do not do so."

"There are clearly costs of change associated with smoking behavior," Viscusi writes of the difficulty of quitting, "but we make choices throughout our lives that are costly to reverse—getting married, choosing a profession.... The fact that reversing a decision is costly does not imply that the choices are [from the standpoint of consumer welfare] incorrect."

VISCUSI'S ANSWER to the apparent paradox of mass smoking in health-conscious America is that perceptions of risk are only half the picture. The other half is tolerance of risk. Tastes vary from person to person, and so does the taste for risk. As long as some people have a low aversion to risk, they may continue to smoke even while seriously overestimating the danger.

Are smokers in fact more willing to take risks? Viscusi reports on the results of a survey he and a colleague conducted of workers in Oregon. The workers were asked how much money they would demand to accept various hazardous jobs. They were also asked whether they smoked. Viscusi found that the workers who smoked required only about half the compensation to accept hazardous jobs as did the average worker. These results, it should be emphasized, were controlled for such factors as age, race, sex, and years of experience on the job (a rough proxy for income).

Viscusi concludes his study by arguing that current American smoking policies are seriously misguided. "Smoking rates rather than health outcomes," he writes, "have become the major concern." Pointing to the official outcry against experimental "smokeless cigarettes" in the 1980s and against "de-nicotined" cigarettes

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in the early 1990s, he charges that "government policies now in place actively discourage safety innovations in cigarettes."

In the long run,

> as income levels increase and individuals place a greater weight on adverse health effects relative to other smoking attributes, the average risk posed by cigarettes will decline and smoking rates will decline as well.... Informed choices and the increased societal concern with health will generate a continued reduction in the health risks smoking imposes on our society. The promotion of more informed and responsible smoking choices should become our policy objective.

Viscusi's findings and arguments are controversial, and are almost certain to be widely discussed. In many quarters, they will be unwelcome. They are inconvenient for those in the public health community who favor paternalistic public policies. And they are inconsistent with the attitudes of a government which, increasingly, views its citizens as tax-revenue producers, and which jealously weighs the budgetary impact of their personal decisions. Yet whatever discomfort Viscusi's findings may produce, he has done public discourse, and his profession, a commendable service.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# Thatcher's vision

IRWIN M. STELZER

LIKE REAGANISM, the phenomenon of Thatcherism presents enormous difficulties to historians, economists, and other scholars. For one thing, the "isms" are difficult to separate from the flesh-and-blood politicians who are their namesakes. Both Ronald Reagan and Margaret Thatcher have personalities that blind their adherents to any faults, and their opponents to any achievements. Love Reagan for his easy geniality, or hate him for his laziness and his actor's one-liners, but few remain neutral.

So, too, with Thatcher. Her critics, venomous to a degree rarely seen even in the snide world of British political journalism, speak of rudeness, arrogance, bossiness, the "hand-bagging" of associates. In her marvelous book, *The Anatomy of Thatcherism*,[†] Dr. Shirley Robin Letwin recounts the charges of "energetic philistinism" and "abrasive vulgarity" leveled at a woman who would, to the establishment and the chattering classes, always be a greengrocer's daughter. Thatcher's admirers, fewer in number at the moment, tell of personal courtesies and kindness, a relentless intelligence, and a concern for the future of her beloved and struggling Britain. To them, bellicosity becomes firmness; impatience, decisiveness.

But personal factors alone cannot explain the inability of scholars to appraise, calmly, the achievements of Thatcher and Reagan. There is also politics. For the first time in the memory of most academics, the scene was dominated by conviction politicians, espousing programs that threatened all the academy holds dear—egalitarianism, anti-materialism, collectivism, social engineering. Even university grants and tenure were no longer sacred cows, to be milked by academics who consider a weekly five-hour teaching schedule to be the modern version of sweatshop conditions.

On the other side of the barricades stood long-frustrated conservatives, many of whom had toiled for a decade in think tanks

[†]Fontana. 377 pp. £6.99.



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

on both sides of the ocean. They sought to fashion programs that would remove discouragements to initiative and to end the welfare policies that simultaneously enraged those who had to pay for them and impoverished their intended beneficiaries. These true believers would brook no criticism of their champions, no matter how justified, lest their hero and heroine be diverted from their course, or the faith of their followers weakened.

As a consequence, the literature on the dominant "isms" of our day is impoverished—a slanging match between hysterical critics and adoring acolytes. That is particularly true of most studies of Thatcherism, with Peter Riddell's data-laden effort to sort through the economic facts *(The Thatcher Decade)* an honorable exception to the mostly spite-laden works of the likes of Hugo Young *(One Of Us)*.

Fortunately, Dr. Letwin has finally blessed us with a felicitously written, thoughtful study that illuminates what she terms the "bundle of attributes" that make up Thatcherism. The dozens of previous works devoted to explaining Thatcherism contain "no agreement whatever about what is meant by Thatcherism ... [T]he commentators cannot escape either being incoherent or fastening incoherence on Thatcherism, and often they do both." The reason, says Letwin, is that Thatcherism differs from "other great isms," such as Marxism and Fascism. The assertions of these isms "were in principle eternal truths." Thatcherism, by contrast, "is a historical phenomenon," addressed to Britain and its problems at a particular time. Thatcherism is not theoretical and rigid, but practical:

> As circumstances change, Thatcherism has provided remedies and prescriptions with an immediacy belonging to the cabinet room or even the war room, and wholly unlike the slow gyrations of the university common room.

This, says Letwin, is a good thing. For representative democracies require flexible governments that can adapt in order to maintain the support of the electorate.

TO UNDERSTAND THATCHERISM, start with the proposition that government exists not to satisfy competing interests, but to satisfy the public good. After all, a Thatcherite would say, only the elected government has the right to make decisions; interest groups do not. If the government cedes its right to make decisions to unrepresentative interest groups, it is derelict in its duty.

Thatcherites had (and still have) a clear view of what that duty is. As Letwin explains, "Thatcherism starts with a concep-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tion of the individual, moves to a conception of the family suited to foster the individual characteristics which it favors, and regards the proper society as one in which the favored characteristics of individuals and families can flourish and be manifested." Society, therefore, does not exist in its own right, but only as an arrangement for the benefit of individuals.

Thatcherism is unique in taking the individual as its "central preoccupation." Other political programs concentrate on ordering the relations within and among groups; they are unconcerned about the character of the individual. "The [Thatcherite] idea of a politics founded upon a conception of individual character," writes Letwin, "is wholly alien to the modern liberal consciousness."

Thatcherites are quite clear as to the individual they prefer: "upright, self-sufficient, energetic, adventurous, independent-minded, loyal to friends, and robust against enemies." (One can almost picture Ronald Reagan, astride his horse or chopping wood in California, taking time off to help Britain in the Falklands or to denounce the Soviet Union's "evil empire.") These "vigorous virtues" contrast with softer ones such as kindness, sympathy, and cheerfulness, overly stressed in postwar Britain, according to Thatcherites. Government must not view its citizens as objects of care, like invalids, but as robust individuals capable of looking after themselves.

From Thatcherites' views about the nature of the individual flow their views about the critical role of the family—the instrument by which the "vigorous virtues" are transmitted from one generation to the next. The family, and only the family, creates the atmosphere of trust and love in which these subtle and intangible virtues can be passed on.

As for the nation, its role is to give practitioners of the vigorous virtues room to flourish. This will make the nation rich, powerful, and respected. If there is a problem, it should not be assumed that government action is the solution. Indeed, past government action (e.g., public ownership) may be the cause of the problem, and if so should be ended (e.g., by privatization). Or the problem may require a reformation of individual attitudes—a replacement of dependency with self-sufficiency, of defeatism with energy, of the celebration of compassion with an emphasis on robustness. This would, even the most impatient Thatcherite always conceded, take time and, even with time, never be entirely realized. That latter realization, says Letwin, is why "Thatcherism is Tory and not millennial or revolutionary...."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Nevertheless, Thatcherism aimed to destroy the establishment and the cozy relationships that had contributed to Britain's economic decline. This gradual impoverishment suited many: the "one-nation Tories," who preferred to preside with grace and style over the division of a shrinking pie; the trade union barons, who saw continuation of the class system as a means of binding their members to them in perpetuity; the established Church, with its aversion to materialism; and the chattering classes, ensconced in their book-lined drawing rooms, who saw no reason why working-class taxes should not be used to subsidize obscure scholarship and entertainments.

Thatcher saw things differently. She set about reversing Britain's decline by attacking the entrenched groups that were "obstacles to the flourishing of the vigorous virtues." If some of the obstacles were found in the Tory Party—in its grandees who preferred accommodation to conflict—or in revered institutions such as the elitist BBC, so be it. They, like the unions, must be tamed. And very largely were.

WHICH BRINGS US to a consideration of Thatcherite programs in action. Letwin's account is quite evenhanded. Her chapter on education, to take one example, bears reading by all those unhappy with our own educational system, especially those on the right. Thatcherites, says Letwin, believed that schools should be more independent of government, more accountable to parents, and should offer vocational training. After all, these policies would promote the vigorous virtues and economic prosperity. Although these plans made sense, Letwin argues, the Thatcherites' plans for the universities did not. Thatcherites "had not seriously reflected on the role of universities" and their historic contribution "to the character of British civilization." The Thatcherites' "practical orientation" and absorption with economics led them to be "easily seduced by arguments ... which treated education as a means to economic success."

Led by Cambridge historian Corelli Barnett (*The Collapse of British Power*) and American Martin Wiener (*English Culture and the Decline of the Industrial Spirit 1850-1980*), Thatcherites adopted the view that Britain's decline was in large part attributable to its educational system's emphasis on liberal arts rather than more practical subjects. This emphasis created a governing class ignorant of technology and disdainful of commerce. Barnett and Wiener argued for a new view of education as the training needed to survive in a competitive world.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

To implement this view, Thatcherites pushed through a series of measures to increase government control of the universities. The goal, complained Enoch Powell, was to use the universities to mold citizens into tools of state economic policy. This Letwin finds abhorrent, and rightly so. But she also objects to the Thatcherites' efforts to rein in university costs, to their notion that universities accepting state funds have some obligation to satisfy elected representatives that those funds are well-spent, and most especially to the view that businessmen might contribute some ideas as to how universities could be managed more efficiently.

Nor were Thatcherite blunders in education confined to the universities, according to Letwin. The imposition of a national curriculum and national testing, both aimed at raising standards, became instead new instruments for lowering them, and for imposing on supposedly independent schools "a curriculum prescribed from the centre," long an unrealized goal of the educational establishment.

Letwin is right, of course, in warning of the dangers of centralization and standardization, and in arguing that they are in basic conflict with the Thatcherite emphasis on individualism. She is right, too, in warning of the dangers of a Bismarckian conversion of the education system into an instrument of economic policy. Bill Clinton, Robert Reich, et al. take note. But surely there is more to be said than Letwin allows for Thatcher's assault on the higher education establishment, which had been almost uniformly intent on perpetuating the policies that brought Britain to the sorry state in which Mrs. Thatcher inherited it. In a society with limited resources, surely the universities should not be issued the blank check that Letwin seems to suggest is their due.

WHAT OF the future? Letwin thinks that Thatcher shifted the political center of gravity to the right, so that even "[o]ld socialists learnt to chant in praise of 'a social market economy'.... As a result, for the immediate future, whichever party is in power, the major changes made by Thatcherism are not likely to be reversed." But danger looms in Brussels. Continental Europeans have never accepted British individualism: They continue to equate individualism with disorder. Hence their desire, says Letwin, to reduce multiplicity to uniformity—and to reintroduce collectivism to Britain via the back door of Brussels.

Perhaps, though, recent events will cheer Dr. Letwin. For the Danes and the Swiss, not to mention a near-majority of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

French, seem to doubt that their future lies in a homogenized Europe. Nor do the Germans seem eager to give up the mark for the European Currency Unit, or to have French and Greek politicians substituted for the board of the Deutsche Bank as arbiters of monetary policy. The predictable but nevertheless spectacular collapse of the European Exchange Rate Mechanism reminds us once again that markets refuse to obey ministers' orders, and that the idea of "convergence"—all European economies converging on the average, from above and below—is still the pipe dream that Margaret Thatcher proclaimed it to be.

More than any writer so far, Dr. Letwin has captured the essence of Thatcherism, both its successes and failures. Would that Reaganism had such an insightful chronicler.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# CONTRIBUTORS

MICHAEL BARONE is a senior writer at *U.S. News and World Report*. He is author of *Our Country* and co-author of *The Almanac of American Politics*.

DOUGLAS J. BESHAROV is a resident scholar at the American Enterprise Institute for Public Policy Research (AEI) and visiting professor at the University of Maryland School of Public Affairs. AMY A. FOWLER is a research assistant at AEI.

DAVID P. BRYDEN is professor of law at the University of Minnesota.

BRANDON S. CENTERWALL is assistant professor of epidemiology at the University of Washington.

NICHOLAS EBERSTADT is a visiting scholar at the American Enterprise Institute for Public Policy Research and a visiting fellow at the Harvard Center for Population and Development Studies.

ROBIN FOX is University Professor of Social Theory at Rutgers University. This article is adapted from his most recent book, *Reproduction and Succession: Studies in Anthropology, Law and Society* (Transaction).

RICHARD T. GILL has taught economics at Harvard University and is co-author of *Our Changing Population* (Prentice Hall). T. GRANDON GILL is assistant professor of management information systems at Florida Atlantic University.

CHRISTINA HOFF SOMMERS is professor of philosophy at Clark University. She is at work on a book on the influence of feminism on American culture. This article originated as a speech to the American Philosophical Association.

IRWIN M. STELZER is a resident scholar and director of regulatory policy studies at the American Enterprise Institute for Public Policy Research.



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

**Back Issues Available at $6.00**

**No. 104 (Summer 1991)**

*David Whitman* The Great Sharecropper Success Story
*David L. Kirp* Textbooks and Tribalism in California
*Nathan Glazer* The Lessons of New York City
*Lino A. Graglia* One Hundred Years of Antitrust
*Ross E. Cheit & Jonathan D. Youngwood* How Not to Reform Auto Insurance

Summer Books
*Jerry Z. Muller* Albert Hirschman's Rhetoric of Recrimination
*Suzanne Garment* Scandal and Cynicism in Post-Watergate Politics
*Don B. Kates, Jr.* Telling the Truth About Guns
*Terry Eastland* The Letter of the Law or the Spirit of the Law?
*Marc F. Plattner* Rousseau's Legacy
*R. Shep Melnick* Are Bureaucrats to Blame?
*Carl F. Horowitz* The Communitarian Mind
*Vincent J. Cannato* Postmodern Populism
*Ben Wildavsky* Common Ground

**No 105 (Fall 1991)**

*Richard T. Gill* Day Care or Parental Care?
*Roger Starr* Waste Disposal: A Miracle of Immaculate Consumption?
*Nicholas Eberstadt* America's Infant-Mortality Puzzle
*Rosalie Pedalino Porter* Language Choice for Latino Students
*John H. Bunzel* Black and White at Stanford
*David P. Goldman* Growth Economics vs. Macroeconomics
*Arthur R. Jensen* IQ and Science: The Mysterious Burt Affair

The *Promised Land* Controversy:
*Nicholas Lemann* The Underclass and the Great Migration
*David Whitman* The Migrants' Tale and Ghetto Culture

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

**No. 106 (Winter 1992)**

*Bernard Semmel* Schumpeter's Curious Politics
*Peter Skerry* The Census Wars

The Education Impasse:
- *Charles Murray & R. J. Herrnstein* What's Really Behind the SAT-Score Decline?
- *Nathan Glazer* The Real World of Urban Education
- *Jackson Toby & David J. Armor* Carrots or Sticks for High School Dropouts?

*Richard B. McKenzie* Was it a Decade of Greed?
*Stephen Moore* So Much for "Scarce Resources"
*Carolyn L. Weaver* Reassessing Federal Disability Insurance
*Richard D. Pollak* The Science of Cancer

**No. 107 (Spring 1992)**

*William G. Mayer* The Shifting Sands of Public Opinion: Is Liberalism Back?
*Irwin M. Stelzer* What Thatcher Wrought
*Herbert Inhaber* Of NIMBYS, LULUS, and NIMTOOS
*Leon R. Kass* Organs for Sale? Propriety, Property, and the Price of Progress
*Peter L. Bernstein* Savings-and-Investment and Other Myths

Summer Books
- *James Q. Wilson* Edward Banfield, American Skeptic
- *Fred Barnes* In Praise of the Eighties
- *Chester E. Finn, Jr.* More Like Them
- *Midge Decter* Sex and *Reason*?
- *Howard Husock* Blacks, Jews, and Neighborhood Change
- *L. Gordon Crovitz* An End to Civil-Rights Laws?
- *John J. DiIulio, Jr.* Deinstitutionalized Delinquents
- *Vincent J. Cannato* Cities on the Edge

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

**No. 108 (Summer 1992)**

The Fate of Black America:
*Elijah Anderson* The Story of John Turner
*Roger Lane* Black Philadelphia, Then and Now
*Daniel Patrick Moynihan* How the Great Society "Destroyed the American Family"
*David J. Armor* Why is Black Educational Achievement Rising?

*Richard T. Gill* For the Sake of the Children
*Mark K. Landy & Mary Hague* Private Interests and Superfund
*Jonathan H. Adler* Clean Fuels, Dirty Air: How a (Bad) Bill Became Law
*Paul H. Messenger* Public-Housing Perversity: A View from the Trenches

**No. 109 (Fall 1992)**

Our Cultural Perplexities:
*Nathan Glazer* "Subverting the Context": Public Space and Public Design
*Michael Lind* Reinventing the Museum
*Michael Medved* The New Sound of Music

*Howard Husock* Bringing Back the Settlement House
*David P. Bryden* Is the Rehnquist Court Conservative?
*Peter F. Drucker* The Post-Capitalist World

Reviews:
*James Q. Wilson* Redefining Equality: The Liberalism of Mickey Kaus
*Walter Berns* On Hamilton and Popular Government

Pro & Con:
*Karin Sandqvist & Bengt-Erik Andersson vs. David Popenoe* "Family Decline in the Swedish Welfare State"

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

**No. 110 (Winter 1993)**

*Heywood T. Sanders* What Infrastructure Crisis?
*John W. Ellwood & Eric M. Patashnik* In Praise of Pork

Our Cultural Perplexities:
*Paul A. Cantor* Shakespeare—"For All Time"?

*George R. LaNoue* Social Science and Minority "Set-Asides"
*Bernard D. Davis* Genetic Engineering: The Making of Monsters?

Pro & Con:
*Andrew J. Cherlin vs. Richard T. Gill* "For the Sake of the Children"

Winter Books
*Mary R. Lefkowitz* Madonna's Intellectual
*Joseph Adelson* Death of a Family
*Eric Reis* Rainbow Warrior
*Suzanne Garment* Of the Pundits, By the Pundits, For the Pundits?
*Roger Starr* New York Story
*Thomas L. Pangle* The Founders' Vision
*Joshua Abramowitz* Head Count
*Irving Louis Horowitz* The End of Sociology?

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# THE NATIONAL INTEREST

*Special 144 Page Issue*

## The Strange Death of Soviet Communism

*An Autopsy*

### *Why Did It Happen?*

Francis Fukuyama, Vladimir Kontorovich,
Myron Rush, Charles Fairbanks,
Peter Reddaway, Stephen Sestanovich

### *Intellectuals and Communism*

Saul Bellow, Nathan Glazer, Irving Kristol

### *Sins of Sovietology*

Robert Conquest, Martin Malia,
William Odom, Richard Pipes, Peter Rutland

❑ **Please send me a year's subscription(four issues) for $21.**

Send Check, Mastercard, AmEx, or Visa# to: The National Interest; Dept. NI; PO Box 3000; Denville, NJ 07834

Name _____
Address _____
City _____
State _____
Zip _____

(To order by phone, call 202-467-4884)
4TPI


LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

# New and Recent Books on Public Policy

Order from your bookstore or direct from the publisher. Major credit cards accepted. Call (908) 932-2280

Transaction Publishers
Department 492PP6
Rutgers University
New Brunswick, NJ 08903

## DRUG POLICY AND THE DECLINE OF THE AMERICAN CITY

*Sam Staley*
*With a foreword by Kurt L. Schmoke*

The drug trade is a growth industry in most major American cities. Staley provides an in-depth analysis of current drug policies, focusing on the relationship between public policy and urban economic development and on how the drug economy has become thoroughly entwined with the urban economy.

**ISBN: 1-56000-039-2 (cloth) 240pp. $29.95**

## HUD SCANDALS

Howling Headlines and Silent Fiascoes

*Irving Welfeld*

The Department of Housing and Urban Development has become associated in the public mind with abuses, favoritism, and mismanagement. Welfeld describes and explains the sensational scandals as well as the hidden blunders that have cost taxpayers billions of dollars.

**ISBN: 1-56000-042-2 (cloth) 176pp. $29.95**

## SCIENCE FUNDING

Politics and Porkbarrel

*Joseph P. Martino*

In recent years Congressional porkbarrel projects have encroached significantly in the area of science funding. Martino offers a critical examination of special-interest funding and the danger it poses to American society and science.

**ISBN: 1-56000-033-3 (cloth) 336pp. $32.95**

## PRIVATIZING CORRECTIONAL INSTITUTIONS

*Simon Hakim, Gary W. Bowman, and Paul Seidenstat, editors*
*With a foreword by Warren Burger*

The solution to overcrowding in federal and state prisons is seen increasingly to reside in the private sector. This volume explores the full range of problems and issues involved with private versus public financing, construction, and management of medium- and high-security prisons.

**ISBN: 1-56000-055-4 (cloth) 292pp. $34.95**

## PROPERTY, POWER, AND AMERICAN DEMOCRACY

*David Schultz*

This volume examines the changing political and constitutional status of eminent domain and property rights. Schultz argues that we need to rethink these concepts by asking what purpose they serve in American society and whether they deserve special legal and judicial protection against legislative interference.

**ISBN: 1-56000-038-4 (cloth) 376 pp. $39.95**

# transaction publishers


LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED